No. 20553

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

ANGUS J. DE PINTO,

Appellant,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,

Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,

Appellees.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

For convenience the appellees will use the same designations in referring to the various transcripts of record and testimony as did appellants. Occasionally appellant DePinto will be referred to as DePinto for purposes of brevity as will be the case with respect to Provident Security Life Insurance Company, United Security Life, and American Security Investment Company who may be referred to

as Provident, United and American respectively.

JURISDICTION

This is a stockholders' derivative action. Niesz v. Gorsuch, 9 Cir., 1961, 295 F.2d 909. Jurisdiction was vested in the district court under 28 U.S.C.A. § 1332. (T.R. 83). Judgment was entered against DePinto from which he has appealed. 28 U.S.C.A. § 1291 is the authority for review of such a lower court judgment.

STATEMENT OF THE CASE

Appellees disagree with much of appellants' statement of the case. The reasons therefor are set forth in Appendix A should the court desire to examine them. The following is appellees' statement of the case. There is incorporated by reference herein, for purposes of background information, the statements of appellees contained in each of their earlier briefs filed here in No. 17114 and No. 18245.

1.

Proceedings In Lower Court.

Following the second reversal of judgment against DePinto in the sum of $314,794.19, appellee Doig moved for partial summary judgment as to liability only. The motion was denied. (T.R. 288). Subsequently a 102 page pretrial order was prepared, signed, and filed on June 10, 1965. (T.R. 92-194). The trial court ruled, after

a motion seeking release therefrom by the Duhame Estate, that the stipulations agreed to in the pretrial order of March 9, 1960 were also binding on the parties. (R.T. 30). DePinto has assigned no error with respect to such ruling. And although DePinto objected to the order at the time it was entered and later included it in his statement of points, he has not assigned as error the ruling of the trial judge in the pretrial order that the pleadings pass out of the case upon the entry of such order. (T.R. 194).

After the Duhame Estate settled its liability for the claimed damages sustained by United prior to October 18, 1957, as well as other claimed damages, for the sum of $100,000, the trial court proceeded on the following Monday, June 14, 1965, with respect to DePinto. Previous to that date, and on June 11, 1965, Civil No. 2974 (this action) and Civil No. 3062 (S.E.C. cause of action against Sabo and Landoe) were consolidated and continued upon the request of appellees and Landoe and Pegram. The full detail with respect thereto will be found in Point 8 herein.

At the close of evidence, DePinto moved for a directed verdict. (R.T. 551, T.R. 292). Such motion was denied. (T.R. 292). On June 16, 1965, a general verdict was returned against DePinto in the sum of $314,794.19. (T.R. 262). DePinto moved for judgment in accordance with his motion for a directed verdict, or in the alternative, for a new trial. (T.R. 254, 263). Upon denial thereof,

this appeal was instituted. (T.R. 273, 274).

Following post judgment proceedings, DePinto filed an action seeking a permanent injunction prohibiting execution of the judgment herein against the marital community property of himself and his spouse. Angus J. and Margaret F. DePinto v. Provident Security Life Insurance Company, Civil No. 5609, U.S. District Court, Phx. The appeal from the entry of summary judgment against defendants is pending here. Angus J. DePinto and Margaret F. DePinto v. Provident Security Life Insurance Company and Albert J. Doig, No. 20308.

On August 18, 1965, DePinto and his spouse filed a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act. (See Exh. D attached to Petition for Writ of Mandamus here in No. 20460). Sworn schedules were filed showing total community debts of $2,113,931.93 and total community assets of $754,109.44. (See Exh. E attached to Pet. in No. 20460). On March 10, 1966, DePinto and his spouse filed a voluntary consent to be adjudicated bankrupt, and James P. Donohue was appointed trustee in bankruptcy. (See Petition of James P. Donohue to intervene here). This court granted the said petition of the trustee in bankruptcy on June 15, 1966. The opening brief of the trustee in bankruptcy and DePinto was timely filed.

The Facts.

DePinto is an educated man having received his undergraduate and medical school degrees at the University of Chicago. (R.T. 181). He began the practice of medicine in Phoenix, Arizona in 1937. (R.T. 181). During his career, DePinto not only practiced medicine, but also successfully managed his own assets and property. (R.T. 181). The investments which he managed were substantial and required his attention and time. (R.T. 507). Among these investments were stores which he owned. (R.T. 507).

In 1947 DePinto met James E. Kelly. (R.T. 182). Subsequent to 1947, DePinto and his wife became very friendly with Kelly and the latter's wife, occupied summer homes next to each other in Carlsbad, California from 1948 until about 1960, entertained each other in their respective homes. (R.T. 182-183). During that period, DePinto made several trips to Carlsbad, California with Kelly via either airplane or automobile. (R.T. 183). The friendship of DePinto and Kelly endured until about 1959 or 1960. (R.T. 183).

In 1952 DePinto worked with and assisted Kelly in promoting a corporation known as Life Underwriters, Inc. as shown below. On June 16, 1952 Life Underwriters, Inc., a management corporation, was formed. (R.T. 183). DePinto understood that the purpose of Life Underwriters, Inc. was to sell life insurance and to take over

smaller companies. (R.T. 183). DePinto owned stock in Life Underwriters, Inc. for which he paid $2,000. (R.T. 183). Kelly was the President and a director of Life Underwriters, Inc., and DePinto was a director. (R.T. 183, 184-185). Prior to October 1, 1952, Kelly discussed with DePinto business affairs of Life Underwriters, Inc. (R.T. 183-184). On October 1, 1952, Life Underwriters, Inc. issued a prospectus for the sale of its stock to the public in which it was stated that DePinto was a director. (R.T. 184). DePinto knew that his name was being used as a director of Life Underwriters, Inc. (R.T. 185).

About a month and a half later, on November 21, 1952, United Security Life was formed. (R.T. 185). Kelly held office as a director and officer of United at its inception and remained in such capacities until July of 1956. (R.T. 185). DePinto knew in late November or early December of 1952 of the corporate existence of United. (R.T. 185). Prior to December 15, 1952, United prepared a prospectus for the sale of its stock to the public. (R.T. 185). That prospectus of United stated under the heading "Relationship with Life Underwriters, Inc." that Life Underwriters, Inc. "is the exclusive operating management and sales agent for United Security." (R.T. 185-186). The prospectus also stated under the same heading that DePinto was a director of Life Underwriters, Inc. (R.T. 186). DePinto presumed that Kelly was using DePinto's name

in a prospectus issued by United. (R.T. 186).

Thereafter United engaged in the dual activities of selling life insurance mainly to members of the armed services and selling its common stock to the public. (R.T. 186). Kelly estimated that between twentyfive and forty persons sold the stock of United to the public. (R.T. 186).

On March 29, 1955, a meeting of United's directors and shareholders was held at which a Dr. Harry Cumming or James Burke complained about the management of United under Kelly. (R.T. 186). DePinto attended this meeting on March 29, 1955, and saw and heard James Burke and Dr. Harry Cumming at that meeting. (R.T. 187). On direct examination by his own counsel, DePinto first testified that James Burke was merely complaining because he (Burke) had been promised a share in United and that Kelly had not fulfilled such promise, and that the meeting ended on a happy vein. (R.T. 499-500). He also testified that Kelly had been given a vote of confidence. (R.T. 500). Later, on cross-examination, he admitted that among the charges which had been made at the March 29, 1955 meeting was that the shareholders were in danger of losing their money. (R.T. 504-505). DePinto also admitted that the charges were serious, and was unable to find any reference in the minutes of the meeting to any vote of confidence having been given Kelly. (R.T. 504-505). In 1960,

five years closer to the March 29, 1955 meeting, DePinto testified that the gist of Burke's complaints was "that things were not going properly with the company and that they were not being admistered properly, and that these stockholders were in danger of losing their money." (R.T. 196).

On October 14, 1955, about seven and a half months after the March 29th meeting, DePinto became a director of United. (R.T. 197). At the time DePinto became a director of United he never intended to be an active member of the board of directors. (R.T. 197). At the time he became a director of United, DePinto had had previous experience as a member of the board of directors of the Phoenix Country Club whose monthly meetings he attended regularly. (R.T. 197). In becoming a director of United, DePinto responded to a request from Kelly that DePinto permit Kelly to "use" DePinto as a member of United's board of directors. (R.T. 198). In agreeing to become a director of United, DePinto allowed Kelly the privilege of DePinto's name. (R.T. 198). At the time he became a director of United DePinto knew that United was selling life insurance to members of the armed forces at government depots. (R.T. 199).

While a director of United, DePinto signed minutes of the directors' meeting of November 15, 1955 stating that he was present in person and participated in the meeting whereas in fact he did not attend such meeting. (R.T. 200-203). DePinto also signed minutes

and a waiver of notice for a directors' meeting of United's board of directors for June 22, 1956 without reading the minutes. (R.T. 205-206). DePinto also signed a waiver of notice of a meeting of United's board of directors for July 18, 1956, and did not read the minutes of said meeting referred to in the waiver. (R.T. 206). At the meeting of July 18, 1956, Kelly resigned as President and a director of United, but DePinto did not know that Kelly had resigned. (R.T. 206-207). DePinto remained unaware of Kelly's resignation as President of United to and including October 18, 1957. (R.T. 207). The minutes of United's board of directors for July 18, 1956 set forth the resignation of Kelly as President and a director of United. (R.T. 206). DePinto signed the minutes of United's board of directors' meeting for February 19, 1957 stating that he was present whereas in fact he did not attend the said meeting. (R.T. 203-204). DePinto thought that Kelly was President of United up to October 18, 1957, and did not know that Kelly had resigned. (R.T. 208).

DePinto never, during his tenure as a director of United, made a telephone call to United's offices to obtain information concerning United's financial condition. (R.T. 208). DePinto, during his tenure as a director of United, did not examine the report of the Director of Insurance prepared for United for the year ending in June, 1956. (R.T. 209). DePinto, during his tenure as a director of United, never

called at United's offices. (R.T. 209). It was DePinto's impression that United earned a profit for the year 1955 whereas it actually sustained a loss. (R.T. 209). DePinto did not know whether United earned a profit or sustained a loss for the year 1956. (R.T. 209). DePinto did not know whether United earned a profit or sustained a loss for the year 1957 up to October 18, 1957. (R.T. 209). DePinto did not know who were the officers of United from July 18, 1956, to October 18, 1957. DePinto never wrote a letter or sent a notice of any kind to the shareholders of United that he did not intend to actively participate as a director of United. (R.T. 209).

It was in the context of the foregoing facts that Kelly decided to sell his stock interest in United sometime in the latter part of 1956 or early 1957. (R.T. 209). Kelly owned sufficient stock in United to give him control thereof. (R.T. 209).

About four or five days prior to October 18, 1957, Kelly suggested to DePinto, in a telephone conversation, that DePinto resign as a director of United in view of the imminent sale of Kelly's stock in United. (R.T. 210). In the same telephone conversation, Kelly told DePinto that the purchasers were buying Kelly's part of United, his stock, and therefore perhaps control of the company. (R.T. 210). DePinto knew at some point in this conversation with Kelly on the telephone, four or five days before October 18, 1957, that the control of United was to be taken over by a new board of

directors. (R.T. 210). DePinto did not, however, know the names of the new board of directors of United. (R.T. 210). DePinto did not ask Kelly for the names of the individuals who were to buy Kelly's stock in United. (R.T. 211). DePinto did not ask Kelly who the new directors of United would be after Kelly's stock was sold. (R.T. 211). When asked to state what steps, if any, he took to ascertain whether the people to whom Kelly proposed to sell his stock were qualified to manage a life insurance corporation, DePinto replied, "absolutely none." (R.T. 211). DePinto took no steps to ascertain whether the persons to whom Kelly was selling the stock were financially responsible persons. (R.T. 211). DePinto did not know and never met the purchasers of Kelly's stock before or on October 18, 1957, or thereafter, until February 23, 1960. (R.T. 211).

On October 17, 1957, at 4:45 p.m., articles of incorporation were filed for American Security Investment Company. (R.T. 210). The articles were filed with the Corporation Commission of the State of Arizona. (R.T. 210). On October 18, 1957, Kelly entered into a written agreement of sale with American whereunder he sold 35,149.89 shares of United stock to American for $325,136.48. (R.T. 212). The incorporators of American were Sabo, Pegram, Landoe, Croydon, Niesz, and Ballantyne who were also directors of American. (R.T. 210). On October 18, 1957, United transferred the following assets to American:

Mortgage loan, H. M. McKinley	$ 31,851.21
Interest accrued on McKinley mtg.	1,572.91
Mortgage loan, F.R. & L. Newville	10,816.67
Interest accrued on Newville mtg.	57.68
Clark County, Nev. # 1 bonds	8,855.60
Interest accrued on Clark C. bonds	84.24
North English, Iowa Coop. Tel. bonds	7,345.25
Interest accrued on North Eng. bonds	85.09
Certificate of Deposit No. 6398, Union Bk.	50,000.00
Certificate of Deposit No. 6399, Union Bk.	50,000.00
Certificate of Deposit No. 25, Bk. of D.	1,012.50
Certificate of Deposit No. 4, Bk. of D.	1,000.00
Promissory notes, United Finance Co.	86,000.00
Interest accrued on United Fin. notes	1,626.88
Check No. 6806 issued to American Sec.	13,588.91
Check No. 6807 issued to American Sec.	9,059.28
Check No. 6808 issued to American Sec.	10,043.78
Cash	6,794.19
Total	$314,794.19

(R.T. 213, O.T. 237-239).

On the same day, October 18, 1957, the above assets were transferred by American to Kelly. (R.T. 214). On October 18, 1957, United received 30,800 shares of the Class A non-voting common

stock of American Security Investment Company. (R.T. 214). No other property or money or assets of any kind were transferred by American to United on October 18, 1957, and the minutes of American for October 18, 1957, at 3:30 p.m. state that such shares were issued for the assets above excluding the $6,794.19 and totaling $308,000. (R.T. 215). On October 18, 1957, American did not have a permit from the Securities Division of the Arizona Corporation Commission authorizing the issuance of 30,800 shares of its non-voting common stock to United. (R.T. 215). The minutes of American's board of directors for 3:30 p.m. on October 18, 1957 state that the stock in United to be purchased by it from Kelly was to be paid for by delivering to Kelly the assets described above with the exception of the $6,794.19 in cash. (R.T. 216). The minutes of United's board of directors for October 18, 1957, at 4:00 p.m. state that DePinto was present, show that the directors of American; Sabo, Pegram, Croydon, Ballantyne and Niesz, were installed as directors by DePinto, Nina Dunn, and J.L. Jenkins, (R.T. 217, T.R. 120), and show that DePinto signed the minutes under the word "Approved." (R.T. 217, T.R. 120). The minutes of United's board of directors for October 18, 1957, at 4:15 p.m. state that the

resignation of DePinto is accepted and that a resolution is adopted transferring the $308,000 in assets to American for the 30,800 shares of the latter's common non-voting stock. (R.T. 217, T.R. 123-126). No signatures of anyone appear on the October 18, 1957 minutes of United's board of directors for 4:15 p.m. (R.T. 515, T.R. 126, Exh. 5-H). DePinto's resignation as a director of United Security Life was accepted at "about 4:15 p.m.". (R.T. 518). The signature of the Secretary of United Security Life does not appear on the minutes of United for October 18, 1957, at 4:15 p.m.

Prior to the sale of Kelly's stock to American on October 18, 1957, both Kelly and Croydon, the latter being one of the directors of American after its formation, knew that Kelly was to be paid with $308,000 in assets of United as described above excepting the $6,794.19 in cash. (R.T. 331, 382). Kelly knew that he was to receive those specific assets of United's about a week or ten days before October 18, 1957 when the transfer actually occurred. (R.T. 331).

Kelly, the seller of the stock in United to American, consulted with tax counsel in preparing his 1957 federal income tax return reporting the amount received from American. He consulted

with Frank Campbell, a leading tax attorney in Phoenix, Arizona, and reported on his federal income tax return for 1957 that the assets described above, with the exception of the $6,794.19 which he did not receive, had a fair market value of $308,000. (R.T. 307, 329-330). The Insurance Department of Arizona, after a two and one half month examination and audit conducted by a Senior Examiner and his assistant, placed a fair market value of $308,000 on the assets, exclusive of the $6,794.19 in cash, transferred from United to American on October 18, 1957 when it concluded that United's deficit had been increased by $308,000 as a result of the loss of such assets. (R.T. 263-265, Exh. 16 at p. 61). American, the purchaser of the $308,000 in assets, reflected that the fair market value of such assets was $308,000 on October 18, 1957 when it entered such amount on its books and records as the corporation's cost thereof. (Exh. 52). The fair market value of the assets transferred from United to American on October 18, 1957 was $314,794.19.

The 30,800 shares of American's class A non-voting common stock, the corporation which had been formed at 4:45 p.m. on October 17, 1957, had no fair market value according to the Insurance Department of Arizona since it found that United's deficit increased by $308,000 as a result of the October 18, 1957 transfer of the $308,000 in assets in return for the 30,800 shares. (R.T. 264-265, Exh. 16). Croydon, a director of American, and

one of the perpetrators of the looting of United who received a $13,588.91 commission from Kelly therefor, received some of the American common stock for services rendered in 1957 in connection with the formation of the company, and he placed no value on the American stock in his federal income tax return. (R.T. 366). American was in a deficit condition on October 18, 1957. (Exh. 52). Croydon stated that the American stock had no value unless the two management contracts it owned had value. (R.T. 364, 367). The Insurance Department of Arizona placed no value on the two management contracts of American when in its examination and audit for the year ending 1957, it concluded that United's deficit increased by $308,000 as a result of the transfer of assets to United in return for the 30,800 shares of American's class A non-voting common stock. (R.T. 264-265, Exh. 16 at p. 61). The 30,800 shares of American's class A non-voting common stock transferred or issued to United by American on October 18, 1957 had no fair market value.

United was in a deficit condition on October 17, 1957, the day before the transfer of $314,794.19 of its assets to American and then to Kelly. (R.T. 263-265, 374, Exh. 16 at p. 61). Both the Insurance Department of Arizona in its 1958 audit of the year ending December 31, 1957, and Croydon so determined. (R.T. 263, 264, 374, Exh. 16 at p. 61).

ARGUMENT

Even if the judgment here is affirmed, the judgment creditor may collect less than thirty-five cents on the dollar. This is because the DePinto marital community is hopelessly insolvent with total liabilities of $2,113,931.93 and total assets of only $754,109.44. Thus, it is the trustee in bankruptcy who is the real party in interest here. He is, by this appeal, seeking to create a fund, at the expense of the judgment creditor here, for general creditors who extended credit years after the entry of the 1960 and 1962 judgment herein. Therefore, in the following argument, when appellee refers to "appellants," the term encompasses both DePinto and the trustee in bankruptcy.

General Response To Appellants' Liability Arguments.

Each of the appellants' contentions respecting proximate cause, liability, rejected or admitted evidence, and claimed error relating to instructions, rests on the assumption that DePinto was required to defend and was charged with only one act of negligence or breach of fiduciary duty - that of electing the outsiders to United's board of directors. Thus, they say that the "only issue in this case was the question of whether or not the transfer of assets from United to American on October 18, 1957 was proximately caused by the negligence of DePinto in participating in the election of the

Niesz group to the Board of Directors of United." This point is reached by ignoring the pretrial order which contains a long list of other acts of negligence, interpreting the complaint in intervention narrowly, ignoring the amended complaint filed by appellee, ignoring the notice received in 1960 at the trial and again in 1962 of the several claims being made against him, and reverting to a theory of nice pleading which is wholly foreign to both the spirit and the substance of the Federal Rules of Civil Procedure.

What this case actually involved is set forth in several pages of the pretrial order listing many acts of DePinto's negligence and breach of fiduciary which were claimed to have proximately caused the loss to United of $314,794.19 on October 18, 1957. (T.R. 141-146, 148-149, 150-156). Many of these particular acts or omissions were set forth in the testimony of DePinto at the 1960 trial (O.T. 1201-1230), were referred to in the 1960 findings of fact and conclusions of law (O.T. 331-353), and again in great detail in the 1962 supplemental findings of fact and conclusions of law ordered by this court. (O.T. 1712-1745). Thus, the district judge instructed the jury at the close of the evidence as follows:

> "The particular acts or omissions on the part of the defendant DePinto, which plaintiffs allege occurred and amounted to negligence or breach of fiduciary duty are as follows:
>
> Acceptance of the office of director without intending to

discharge the duties and responsibilities of director; delegating or relinquishing his responsibilities as a director to Kelly; failing to attend directors' meetings; failure to examine minutes, records and transactions and documents of the corporation; failure to keep himself advised by reasonable inquiry as to important transactions of the corporation, and particularly as to the transactions in question resulting in the transfer to Kelly of corporate assets; failure to investigate and to require measures for protection of the corporation with respect to conditions and transactions potentially harmful to the corporation and stockholders when such were brought to his attention or of which he should have learned in the exercise of reasonable care, and failure to exercise reasonable care to assure that adequate funds, property, and security be obtained by the corporation in return for the transfer to James E. Kelly of substantial assets of United Security Life.

"The defendant DePinto denies each and all of the plaintiff's allegations in every particular. This places the burden of proof upon the plaintiffs to establish by a fair preponderance of the evidence the material allegations of their claim against DePinto that are denied by him.

"The essential issues of the case are:

" 1. Is defendant DePinto chargeable with negligent breach of fiduciary duty in any one or more of the particulars asserted by plaintiffs? If so,

" 2. Did such negligent breach of fiduciary duty of defendant DePinto proximately contribute to causing financial loss and damage to United Security Life, a corporation? If so,

" 3. What was the amount of such loss and damage to United Security Life? " (R.T. 570-571). (Underscoring supplied)

Thereafter, the district judge instructed the jury at length with respect to the law applicable to the various acts of claimed negligence.

For example, he instructed the jury that a particular director who delegates his duties and responsibilities to another and negligently fails to take part in the management of the corporation is liable for the misconduct or negligence of those to whom he delegated his responsibilities which was the proximate cause of loss to the corporation. (R.T. 581). This was the rule set forth in Supplemental Conclusion of Law No. 5 filed by the district judge on March 28, 1962. (O.T. 1734).

In short, the jury was given many acts of negligence or breach of fiduciary duty claimed by appellee to have been committed by DePinto, and it was their job to decide if they had been committed, and if so, did any proximately cause loss to United, and if so, what was the amount of that loss?

Therefore, appellants' appeal and argument is fatally defective when they say there is no proximate cause between one of these acts of negligence - the election of outsiders to United's board - and the loss of $314,794.19 of United's assets to Kelly. There were several other acts of negligence and breach of fiduciary duty submitted to the jury, and appellants cannot overcome the jury's finding of proximate cause between one or more of those acts and the $314,794.19 loss to United by arguing there is no proximate cause, assuming they are correct, between the negligent act of electing the outsiders to United's board and the loss.

For example, there is no dispute at all that DePinto delegated his duties as a director to Kelly, and that Kelly robbed United of $314,794.19 of its assets. That is,the proximate cause between Kelly's acts and the loss is patently clear. Also, there is no argument respecting the conclusion that Kelly was negligent and improper in his conduct toward United. Therefore, the law makes DePinto liable for Kelly's negligence or misconduct. (See a full statement of the law at O.T. 1734). Consequently, how does an alleged lack of proximate cause between DePinto's negligent act in electing the Niesz board and the $314,794.19 loss to United prevent the jury from holding him liable under the above claim of having delegated his duties to Kelly? The same applies to each of the other acts of claimed negligence about which the trial court instructed the jury, and about which DePinto

has said nothing in his opening brief because of his contention that the only question was whether the loss was proximately caused by his negligence in electing the Niesz board.

A cursory reading of the first five points of appellants' brief shows that their request for a directed verdict and a new trial, with the exception of the damages contentions relating to the new trial request, is grounded on their view that the only issue which could have gone to the jury was the limited issue of whether one act of DePinto's negligence - electing the Niesz board - was the proximate cause of United's loss on October 18, 1957. Thus, they have not even attempted to show there is no substantial evidence to support the jury's verdict with respect to the other acts of negligence and breach of fiduciary duty submitted to it. What is the basis of this view of the case?

Originally DePinto objected to the pretrial order provision that "as a result of this pretrial order the pleadings pass out of the case." (T.R. 194). This was because he insisted that plaintiff could only make the claim against him as DePinto stated it. (R.T. 122-123). However, he has not assigned as error that ruling of the district court, and has presented no argument citing any authority in support of his position. Instead he has made an oblique attack on the pretrial order by referring to the very pleadings which the pretrial order stated passed out of the case, and arguing therefrom that the complaint

in intervention only may be referred to, that since DePinto resigned from United's board the Count VI therein could not apply because DePinto could not therefore have "caused" or "permitted" United to transfer its assets to American, and that since Count VII of the complaint in intervention alleges that DePinto negligently transferred the control of United, the only issue which the jury was permitted to hear was whether the transfer of assets from United to American on October 18, 1957 was proximately caused by negligence of DePinto in participating in the election of the Niesz group to United's board of directors. (Br. 28). Thus, he says any evidence admitted with regard to the other acts of negligence or rejected with respect to his sole issue, any instructions rejected with regard to his sole issue, any instructions given regarding the other acts of negligence, constitute error. And finally appellants argue that proximate cause was not possible with respect to the issue as they framed it, and therefore they were entitled to a directed verdict. That is their case in Points 1 through 5 except for the damages issue.

Appellees say DePinto had notice of appellee's claims of several acts of negligence as far back as 1960, that the pretrial order cannot be indirectly attacked as appellants are doing, that the philosophy of narrowly construing a pleading and then finding that any variance between that contruction and the proof is fatal to the pleader and prejudice to the defendant if allowed has not been accepted

in the federal courts for nearly half a century and certainly not since the adoption of the federal rules, that assuming DePinto's resignation was in fact accepted before the assets of United were taken it does not follow that his negligence and breach of fiduciary duty up to the point when the resignation was accepted did not "cause" United to transfer its assets or "permit" United to enter into an agreement whereby its assets were transferred for worthless stock, that Rule 8 requires a short plain statement of the claim and therefore the federal courts do not narrowly limit the issues to a jury as DePinto claims, that Rule 16 negates the contention appellants are making, and that the modern philosophy of pleading is that they do little more than indicate generally the type of litigation that is involved. 2 Moore, Federal Practice § 8.03 at 1607. Appellants have failed to assign as error the entry of the pretrial order with its provisions concerning the pleadings, and have failed to argue with respect thereto. Thus, they have abandoned such a point.

Appellees, in the following material, answer appellant's request for a directed verdict, and then his arguments concerning a new trial. Before reaching the new trial arguments, appellee advances the constitutional argument that a directed verdict cannot be granted after a jury verdict has been returned for the plaintiff. Should the court have a question with respect thereto, it may wish to read that contention first. (See page 52, infra.)

1.

Appellants Have Not Carried Their Burden Of Showing That The Jury Verdict Is Not Supported By Any Substantial Evidence.

Although appellant DePinto stipulated in the pretrial order of March 9, 1960 that there were "no material issues of any material fact as to him",[1] he contended during both the first and second appeals of his to this court that he had been deprived of his right under the Seventh Amendment to have the issue of his liability submitted to a jury. This court gave him the jury trial he sought by so ordering, and reversing and remanding for a new trial.[2] Shortly thereafter, appellee filed a motion for summary judgment on the issue of liability only. On November 9, 1964, U.S. District Judge George H. Boldt directed all counsel of record to file their respective memoranda supporting or opposing the said motion by certain specified dates, and set the said motion for a hearing on December 2, 1964. On November 20, 1964 DePinto filed an affidavit of bias and prejudice in which he alleged:

"On the 13th day of April, 1964, attorneys for plaintiffs filed herein a Motion For Summary Judgment on Issue of

1. O.T. 261.
2. DePinto v. Provident Security Life Insurance Company, 9 Cir., 1963, 323 F.2d 826.

Liability Only. Notwithstanding the fact that the granting of such Motion will be in derogation of and contrary to the mandate and decision of the Court of Appeals for the Ninth Circuit (DePinto v. Provident Security Life Insurance Company, 323 F.2d 826), requiring a new trial before a jury, Judge Boldt has issued a Memorandum dated November 9, 1964, a copy of which is attached hereto as Exhibit "C", and by reference incorporated herein, which Memorandum discloses that Judge Boldt intends to consider said Motion For Summary Judgment on the merits." (T.R. 66, 67).

Thus, the very prospect of a ruling by the trial court on the issue of DePinto's liability, rather than a submission to a jury, was so horrendous to DePinto that he made the serious charge that Judge Boldt was biased and prejudiced, and assigned as one of the reasons in support thereof the fact that Judge Boldt intended to consider the motion for summary judgment. The motion for summary judgment was denied by Judge Boldt on March 5, 1965. (T.R. 288).

Later, in the pretrial order which was entered on June 10, 1965, DePinto contended that the issues of his negligence, breach of fiduciary duties, proximate cause and the amount of loss to United were "issues of fact to be determined by the jury herein." (T.R. 161).

Nevertheless, and despite his prior insistence upon the submission of such issues to the jury, now that DePinto has had a jury

trial and the general verdict returned was adverse to him, he seeks to overcome that adverse jury verdict by contending that the district court erred in having submitted such issues to the jury for determination. In so contending, at this point, that he got a jury trial but should not have, DePinto, after eight years of litigation, has come full circle - back to the point of beginning.

The appellants' contentions that the trial court erred in denying DePinto's motion for a directed verdict at the close of all of the evidence (Specification of Error No. 1), and in failing to grant his motion for judgment in accordance with his motion for a directed verdict (Specification of Error No. 10), present the sole question of whether there was any evidence to support the verdict of the jury. (Appellants' Questions 1 and 2). In order to determine whether or not appellants have carried their burden herein of proving their contention that there is no evidence in the record to support the verdict, it is first necessary to review the rules respecting the scope of review of a jury verdict and the test to be applied on such review.

a.

Scope Of Review Of Jury Verdict.

In the leading case of Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 35 (1944), the scope of review of jury cases is stated to be:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."[3]

3. Reaffirmed in Scintilles v. Inter-Caribbean Corp., 361 U.S. 107, 110, and Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 114-115. Cited with approval by this court in Southern Pacific Company v. Heavingham, 9 Cir., 1956, 236 F.2d 406, 409, and by the Supreme

Thus, once a jury has made ultimate findings respecting liability and loss, the defendant is not free to relitigate the factual dispute in the appellate court. Lavender v. Kurn, 1946, 327 U.S. 645, 652. To do so would constitute a denial of plaintiff's rights under that clause of the Seventh Amendment which provides that: "... no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In this respect the instant appeal differs from the earlier two appeals in which appellant contended that he was entitled to a trial de novo in this court,[4] and thus asked the court to review the evidence and draw its own conclusions therefrom respecting the liability of DePinto. Review in the instant appeal, being an appeal from a general verdict of a jury, is limited to the questions of whether or not the trial court erred, as a matter of law, respecting its rulings on defendant's motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial.

Court of Arizona in Apache Ry. Co. v. Shumway, 1945, 62 Ariz. 359, 158 P. 2d 142, 150, wherein it was concluded: "The only remaining question is as to proximate cause... The decision of the Supreme Court of the United States in Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 64 S. Ct. 409, 411, 88 L. Ed. 520, holds that the jury finding forecloses all questions as to this. All that is required in negligence cases is for the plaintiff to present probative facts from which negligence and the causal relation may be reasonably inferred..."

4. Opening brief of appellant DePinto in No. 17114 at 35.

b.

Standard To Be Applied On Review Of Jury Verdict.

Inquiry upon review of a jury verdict is focused initially and primarily upon the question of whether there is a reasonable basis in the record for the ultimate findings of fact made by the jury. Not only is appellate review of the jury's verdict limited to such inquiry, but as stated in Lavender v. Kurn, supra, it is "only where there is a complete absence of probative facts to support the conclusion (verdict) reached does a reversible error appear." Therein the Supreme Court of the United States stated:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusions. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court

might draw a contrary inference or feel that another conclusion is more reasonable." (Underscoring supplied)

The language of the Supreme Court in the foregoing sentence which was partially underscored, and which succinctly states the ultimate test on review of a jury verdict, was quoted with approval by this court in Sherwood & Roberts-Kennewick, Inc. v. St. Paul F & M. Ins. Co., 9 Cir., 1963, 322 F.2d 70, 77, n. 8. Stated in another way, the same "total lack of evidence test" was said, in Lyons v. Gilliland, 9 Cir., 1962, 303 F.2d 452, 453, to be that the finding of the jury is binding "unless there is no substantial evidence, whether contradicted or not, to support the jury verdict". (The emphasis on the word "no" was placed there by the court). The standard has also been stated by this court as an inquiry into "whether there is any or sufficient evidence to sustain a verdict." United States v. Oliver, 9 Cir., 1932, 59 F.2d 53, 55.[5] Although it has been stated in various ways, "the rule is clear that on appeal from a judgment based upon a jury's verdict the verdict and judgment based thereon will be sustained if there is substantial evidence in the record in support thereof." Richfield Oil Corporation v. Karseal Corporation,

5. See further Lumbra v. United States, 1934, 290 U.S. 551, 553: "... The question presented is whether there is any evidence upon which a verdict for petitioner might properly be found..." (Underscoring supplied); Quebedoux v. Hammons, 9 Cir., 1927, 22 F.2d 530, 532: "...The rule is too well settled to require citation of authority that, if there is any substantial evidence to sustain the allegations of the complaint, a peremptory instruction to find for the defendant should be refused..." (Underscoring supplied).

9 Cir., 1959, 271 F.2d 709, 712. See also, Flintkote Company v. Lysfjord, 9 Cir., 1957, 246 F.2d 368, 374, 375. Arizona follows the "substantial evidence" rule. Casey v. Beaudry Motor Company, 83 Ariz. 6, 315 P.2d 662, 665-666.

In considering the question of whether there is any substantial evidence in the record in support of the jury's verdict, the following general rules are applicable:

1. It is assumed that all evidence before the jury was properly admitted. Flintkote Company v. Lysfjord, 9 Cir., 1957, 246 F.2d 368, 377; Salt River Valley Water Users' Ass'n v. Barry, 1926, 31 Ariz. 51, 250 P. 356, 360.[6]

2. All facts which plaintiff's evidence tends to prove must be assumed to have been established, and all inferences fairly deductible from such facts must be drawn in his favor. Lumbra v. United States, 1934, 290 U.S. 551, 553; Gunning v. Cooley, 1930, 281 U.S. 90, 94; Sherwood & Roberts-Kennewick, Inc. v. St. Paul F. & M. Ins. Co., 9 Cir., 1963, 322 F.2d 70, 75; Richfield Oil Corporation v. Karseal Corporation, 9 Cir., 1959, 271 F. 2d 709, 712; United States v. Bemis,

6. Since " ... the competency of evidence is not properly triable upon a motion for an instructed verdict..." City of Phoenix v. Brown, 1960, 88 Ariz. 60, 352 P. 2d 754, 757, for the reason that a motion for an instructed verdict goes only to the sufficiency of the evidence and presupposes that all evidence was admitted by the court was competent, relevant and material, Salt River Valley Water Users' Ass'n v. Barry, 1926, 31 Ariz. 51, 250 P. 356, 360, appellants' contention that there is no competent evidence to support the jury's verdict respecting damages is not well taken. (See appellants' brief at p. 15).

9 Cir., 1939, 107 F.2d 894, 897; Figueroa v. Majors, 1959, 85 Ariz. 345, 346, 338 P.2d 803, 804; Golfinos v. Southern Pacific Company, 1959, 86 Ariz. 315, 345 P.2d 780, 781; City of Phoenix v. Brown, 1960, 88 Ariz. 60, 352 P.2d 754, 757.

3. A motion for directed verdict may only be granted when a verdict the other way would have to be set aside by the court. Gunning v. Cooley, 1930, 281 U.S. 90, 94-95; Galloway v. United States, 1943, 319 U.S. 372, 395-396; Standard Accident Ins. Co. of Detroit, Mich. v. Winget, 9 Cir., 1952, 197 F.2d 97, 100; Golfinos v. Southern Pacific Company, 1959, 86 Ariz. 315, 345 P.2d 780, 781.

4. Where the evidence on material facts is conflicting, or where on undisputed facts reasonable men may differ as to the inferences and conclusions to be drawn from the evidence or where different conclusions might reasonably be reached by different minds, the jury verdict will be affirmed. Gunning v. Cooley, 1930, 281 U.S. 90, 94; Wong v. Swier, 9 Cir., 1959, 267 F.2d 749, 752; Figueroa v. Majors, 1959, 85 Ariz. 345, 346, 338 P.2d 803, 804; Golfinos v. Southern Pacific Company, 1959, 86 Ariz. 315, 345 P.2d 780, 781.

5. The question of negligence and proximate cause is one of fact to be submitted to the jury, and it is only where the evidence, even though it be uncontradicted, is such that all reasonable men must draw the same conclusions from it that the question becomes one

of law for the court. Gunning v. Cooley, 1930, 281 U.S. 90, 94; Wong v. Swier, 9 Cir., 1959, 267 F. 2d 749, 752, 754; Figueroa v. Majors, 1959, 85 Ariz. 345, 346, 338 P. 2d 803, 804.

6. Where inconsistent inferences may be drawn from the evidence, it is for the jury to determine which of the inferences shall be drawn, Tennant v. Peoria & P. U. R. Co., 1944, 321 U.S. 29, 35; Gunning v. Cooley, 1930, 281 U.S. 90, 94; Wong v. Swier, 9 Cir., 1959, 267 F. 2d 749, 754; Figueroa v. Majors, 1959, 85 Ariz. 345, 346, 338 P. 2d 803, 804.

7. "It is not without significance in the appeal that the judge, who heard the testimony and was in a position to observe the demeanor of the witnesses, not only declined to direct a verdict, but denied as well a motion for a new trial." Phoenix Blue Diamond Express v. Mendez, 9 Cir., 1939, 103 F. 2d 66, 69.

8. "It is well established that the verdict must stand unless appellant can show there is no substantial evidence to support it considering the evidence in the light most favorable to appellees, and clothing it with all reasonable inferences to be deduced therefrom..." Gulf Oil Corporation v. Griffith, 5 Cir., 1964, 330 F. 2d 729, 731.

In addition to the foregoing rules, it is submitted that, in deciding whether error had been committed in denying appellant DePinto's motion for a directed verdict, this court should give some weight to the fact that the ruling on that motion was made by the

same trial judge who had been reversed by this court for not having submitted the question concerning breach of fiduciary duty, as well as negligence, to a jury. DePinto v. Provident Security Life Insurance Company, 323 F.2d 826.

c.

Appellants Have Not Attempted To Show That The Jury's Verdict Is Not Supported By Any Substantial Evidence.

The evidence of record, briefly summarized in appellees' statement of facts, supra, is more than sufficient to support the jury's verdict. That is most likely the reason why appellants have not attempted to show, as they must in order to prevail herein, that there is no substantial evidence to support the jury verdict.

Instead of attempting to show that there is no substantial evidence in the record to support the jury verdict, appellants simply make the statement of preference and conclusion that "the verdict rendered in the lower Court has no support in the evidence" (Br. 27), and have then reasserted the argument advanced during the first appeal herein (No. 17114) in support of the request which DePinto then made that this court review the evidence and "consider the case de novo".[7] In electing to stand on that original argument, appellants have overlooked the

7. Opening Brief of Appellant DePinto, No. 17114, at p. 35.

effect of a jury verdict and the foregoing rules governing the review of a jury verdict.

d.

The Issue Of Proximate Cause Was Not One Of Law But Of Fact For The Jury.

Appellants' contention that DePinto was entitled to a directed verdict at the close of the evidence disregards the well-established rule that where the evidence on material facts is conflicting, or where on undisputed facts reasonable men may differ as to the inferences and conclusions to be drawn from the evidence or where different conclusions might reasonably be reached by different minds, the question is not one of law but of fact for the jury. Gunning v. Cooley, 1930, 281 U.S. 90, 94; Wong v. Swier, 9 Cir., 1959, 267 F.2d 749, 752; Figueroa v. Majors, 1959, 85 Ariz. 345, 346, 338 P.2d 803, 804; Golfinos v. Southern Pacific Company, 1959, 86 Ariz. 315, 345 P.2d 780, 781.

Thus, even if it is assumed for argument's sake, that, as contended by appellants, the facts are "undisputed", the issue of proximate cause did not become a question of law; it was properly submitted by the trial judge to the jury for determination because on such "undisputed" facts it was possible that reasonable men might differ as to the inferences and conclusions they would draw from such

evidence respecting proximate cause, and it was possible that different conclusions might reasonably be reached by different minds respecting proximate cause. Surely when Judge Boldt submitted the issue of proximate cause to the jury, he was giving DePinto the benefit of any and all doubt respecting that issue in view of the evidence here.

The issue of proximate cause was properly submitted to the jury, and therefore Point 1 of appellants' brief in regard to the claimed lack of proximate cause is without merit. It was an issue for the jury, and not for the parties on appeal.

e.

Appellants Have Conceded That The Verdict Is Supported By Evidence With Respect To Whether Several Of The Claimed Acts Of Negligence And Breach Of Fiduciary Duty Proximately Caused Loss To United.

As shown earlier under the designation General Response To Appellants' Arguments About Liability, DePinto has directed argument with respect to whether the jury verdict is supported by any substantial evidence only to one of the eight acts or claims of negligence and breach of fiduciary duty which were submitted to the jury - his negligence in electing the Niesz group to United's board of directors. Therefore, with respect to the other acts and

breaches of fiduciary duty, appellants have conceded that there is substantial evidence to support the verdict. In view of the evidence, undisputed by DePinto at any time during the last eight years, with regard to Kelly's negligence and misconduct and DePinto's delegation of his duties to Kelly, it is apparent why DePinto has not bothered to argue with respect to the other acts of negligence.

f.

Assuming The Only Issue Were Whether DePinto's Negligent Act In Electing Outsiders To United's Board Was A Proximate Cause Of United's Loss Of $314,794.19, Appellants Were Not Entitled To A Directed Verdict On The Issue Of Whether Such Transfer Of Control Was A Proximate Cause Of Loss.

The substance of appellants' position in seeking a directed verdict is that, as a matter of law, there can be no causal connection between DePinto's negligent transfer of control to the Niesz group and the loss to United. They appear, at page 17, to concede that DePinto was negligent, but at page 23 seem to argue that there could be no negligence because there is no duty to determine what the outsiders propose to do with the corporation once they obtain control. Assuming first that they have conceded negligence in regard to the transfer of control, the question is whether appellants'

view of the law is correct and whether they have applied law to undisputed facts or merely facts they contend are undisputed.

The key "fact" upon which DePinto's legal argument is based, is that he resigned prior to the time when the corporate resolution was adopted at the 4:15 p.m. directors' meeting of United. Upon that platform, he then constructs his entire argument that he can only be held vicariously liable for what the Niesz group did, and that there can be no proximate cause shown between his act of transferring control and their act of adopting a resolution taking United's assets. However, it is only DePinto's view that it is "undisputed" that he resigned prior to the time when the resolution was adopted at the 4:15 p.m. meeting of United's board on October 18, 1957. As shown more fully in Point 4 herein, infra, this contention is based on DePinto's theory that he resigned before the said resolution transferring assets was adopted because the paragraph preceding such resolution refers to the acceptance of his resignation. It was stipulated that DePinto resigned "about 4:15 p.m.", but there was no stipulation that he resigned prior to the time when the resolution transferring assets was adopted. The reason, of course, was that the 4:15 p.m. minutes were unsigned by anyone. (Exh. 5-H). Also, since DePinto testified in response to a question from his own counsel that he did not sign the 4:00 p.m. minutes of October 18, 1957 until October 19, 1957, the question of when the respective

resolutions were actually adopted was an open one. A jury is not required to accept DePinto's version of how the unsigned minutes of 4:15 p.m. must be interpreted. He has not shown any evidence that compelled the jury to find that he had resigned a second or two before the resolution transferring the assets was adopted, assuming they even thought it was significant in view of some of the other issues of negligence which were before them.

Assuming however for the sake of argument that DePinto's resignation was accepted a second or two before the Board of Directors's adoption of the resolution transferring assets occurred, the case law cited by appellants does not sustain his contention that there cannot in such a case be proximate cause as a matter of law between his prior act of turning over control to outsiders and the taking of assets by such outsiders. If that were true, then as a matter of law, there could not be liability imposed on those who negligently transfer control to outsiders who loot a corporation after resignations have been accepted from the transferors.

First, Insuranshares Corporation v. Northern Fiscal Corp., 35 F. Supp 22, certainly held that there was no proximate cause problem between the act of transferring control and the subsequent acts of the outsiders in looting a corporation. The court ruled that:

" ... the owners of control are under a duty not to transfer it to outsiders if the circumstances surrounding the proposed

transfer are such as to awaken suspicion and put a reasonable man on his guard - unless a reasonably adequate investigation discloses such facts as would convince a reasonable person that no fraud is intended or likely to result. Thus, whatever the extent of the primary duty may be, circumstances may be sufficient to call into being the duty of active vigilance and inquiry. If, after such investigation, the sellers are deceived by false representation, there might not be liability, but if the circumstances put the seller on notice and if no adequate investigation is made and harm follows, then liability also follows."

Appellants' next case, at page 17, Barnes v. Andrews, 298 F. 614, does not support his argument. The reason is that the causal relationship in issue therein was between the defendant director's errors in business judgment and the business failure of the corporation; had this been a case of an illegal loan, the court pointed out, it would be a fair inference that a protest would have stopped the loan and that the director's neglect caused the loss. Here the loss to United was not due to a business failure. Rather the loss of United was closer to a situation involving an illegal loan which Judge Hand in Barnes, supra, said presented a fair inference that a director's failure to do his full duty caused the loss.

Appellants' citation of Michelson v. Penny, 2 Cir., 1943, 135 F.2d 409, at page 22 of their brief, is equally devoid of support for their contention that there can be no proximate cause, as a matter of law, between the transfer of control and subsequent loss caused by the outsiders. The language quoted by appellants from the case pertains to causal relationship between a director's violation of a provision of the Banking Act requiring directors to own stock and the loss complained, which requires the application of the standard of strict liability. Appellants did not point out that in Michelson, supra, the court did find a causal relationship between Penney's nonfeasance (complete neglect of duty as a bank director) and the loss to the bank.

Neither Benson v. Braun, 1956, 155 N.Y.S. 2d 622, nor Angelus Securities Corp. v. Ball, 1937, 20 C.A. 2d 423, 67 P.2d 152, nor Pritchard v. Myers, 1938, 174 Md. 66, 197 A. 620, involved any issue of proximate cause. These cases are discussed at pages 80, 83, 84 and 91 of appellee's brief here in No. 17114. It should be noted that Angelus Securities, supra, actually held that directors can be held liable for the acts of other directors where they "were negligent in supervising the corporate business" or "were negligent in the appointment of the wrongdoers."

The Briggs v. Spaulding, 1891, 141 U.S. 132, case, cited at page 20 of appellants' brief, which like all of the cases cited by

them in support of the proximate cause contention, was not a jury case, and was based on a conclusion by the court that the factual evidence in the record did not establish the negligence of the directors. Appellants have conceded the decision did not turn on a finding or ruling of lack of proximate cause at page 21 of their brief.

The last case cited by appellants, at pages 18 and 19 of their brief, Minnis v. Sharpe,1932, 203 N.C. 110, 164 S.E. 625, stated only that plaintiffs had failed to carry their burden of proof. There the director resigned in January of 1927 and the loss occurred after November 27, 1927. Thus, the case is hardly "directly in point" with the assumed facts submitted by appellants to the effect that DePinto resigned one or two seconds before the loss occurred. The case was based on an absence of evidence showing a causal connection. If appellants are suggesting that there must be actual proof of a causal relation, by their citation to Minnis, supra, between DePinto's negligence and the loss to United, they are in error. The rule is otherwise, as most recently reaffirmed in Robledo v. Kopp, 1966, 99 Ariz. 367, 409 P.2d 288, 291:

" ... In Apache Railway Company v. Shumway, 62 Ariz. 359, 158 P.2d 142, 159 A.L.R. 857, we held:

' * * * All that is required in negligence cases is for the plaintiff to present probative facts from

w hich negligence and the causal relation may be reasonably inferred.' "

The cases cited by appellant do not support the principle that, as a matter of law, there is no causal connection between the act of transferring control to outsiders and the subsequent loss to the corporation caused by the acts of such outsiders. The instructions which were given to the jury, and to which no exception was taken by DePinto, are also to the contrary. That instruction stated:

" Resignation of a director will not relieve a director of liability for corporate loss or damage proximately caused or contributed to by the resignation itself when a director knows, or in the exercise of reasonable care should know, that the interests of the corporation will be endangered by the resignation or will result in transfer of control of the corporation to others who are intending to approve and put in effect corporate transactions which the resigning director knew, or in the exercise of reasonable care should have known, would result in loss or damage to the corporation." (R.T. 582).

Assuming that appellants have argued, at page 23 or elsewhere in Point 1 of their brief, that there can be no negligence, as a matter of law, where a director turns control over to outsiders,

the Insuranshares doctrine is to the contrary. So is the foregoing instruction to which DePinto did not object. The law is that where the circumstances are such as to put the transferor on notice and if no adequate investigation is made and harm follows, then liability follows. Here the jury was certainly entitled to conclude as they did. DePinto's friend Kelly was selling about 38% of the stock in a corporation having a deficit the day before the sale for the sum of about $325,000. DePinto, as a director, should have known that United was in a deficit condition, and therefore the circumstances were such that a reasonable man would have been put on notice. It is no answer for DePinto to say he did not know because that is to elevate nonfeasance as a defense to a negligence action founded on nonfeasance. Kelly and Croydon and a group of lawyers, as well as the outsiders, all knew before October 18, 1957 that United's assets were to be used to pay Kelly for his stock. The only man who did not know was DePinto who did absolutely nothing, and has used that nonfeasance as an answer to the charges of negligence and breach of fiduciary duty. The jury did not agree with him, and he is now foreclosed from arguing the evidence again.

The argument he makes that there is a presumption that the outsiders who took United's liquid assets had good reputations is irrelevant as shown in Point 2 hereof . If DePinto's arguments concerning the good reputations of those who robbed United of its

assets had vitality, the court in Insuranshares, supra, would not have said the investigation must disclose such facts as would convince a reasonable person that no fraud is intended or likely to result. Here any investigation of a sale for $325,000 of 38% of the stock of United, a corporation having a deficit the day before the sale, would put any reasonable director on notice.

Appellants' contention that, as a matter of law, there could be no proximate cause between the transfer by DePinto of control of United to outsiders and the acts of the latter causing loss to United, is without merit.

g.

There Is Evidence In The Record To Support The Jury's Verdict Respecting Damages.

Appellants contend, at page 24 of their brief, that there was no competent evidence that United's assets were worth $314,794.19. Not only does the foregoing Statement of Facts demonstrate that such a contention is unfounded, but the competency of the evidence admitted respecting such issue is irrelevant to the only question when deciding whether a trial court erred in denying a motion for a directed verdict - whether there is any evidence in the record to support the jury's verdict respecting damages. In considering that question it is assumed that all the evidence which was before the jury had been properly admitted. Flintkote Company v. Lysfjord, 9 Cir., 1957,

246 F.2d 368, 377; Salt River Water Users' Ass'n v. Berry, 1926, 31 Ariz. 51, 250 P. 356, 360. The competency of evidence is not at issue upon a motion for directed verdict or the review of the denial thereof for the reason that a motion for a directed verdict goes only to the sufficiency of the evidence and presupposes that all of the evidence admitted by the court was competent, relevant and material. City of Phoenix v. Brown, 1960, 88 Ariz. 60, 352 P.2d 754, 757; Salt River Water Users' Ass'n v. Berry, supra.

At pages 24 through 26 appellants claim that the evidence "discloses that such assets were not worth that amount." However, that statement is not an argument that there is no evidence to support the jury's verdict on damages. It is nothing more than arguing the evidence on the theory that this appeal is a trial de novo. Appellants are simply disagreeing with the conclusions drawn from the evidence by the jury, and that contention is not available to them on an appeal from the denial of a motion for a directed verdict. Thus, although their Specification of Error No. 1 states there was no evidence from which the jury's verdict could be sustained except through conjecture and speculation, they have submitted no argument that there is no evidence. Furthermore, as the Supreme Court of the United States held in Lavender v. Kurn, 1946, 327 U.S. 645, 652, in regard to directed verdicts: "It is no answer to say that the jury's verdict involved speculation and conjecture." The Supreme Court went on to say it is "only where there is a complete absence of probative facts

to support the conclusion reached reached does a reversible error appear." Consequently, appellants' assignment of error itself is deficient. Since that is so, and there has been no argument that there is no evidence to support the jury verdict on damages, the appellants' assignment of error with respect thereto should be dismissed.

Assuming arguendo that appellants had presented argument on the question of whether there was evidence to support the jury's verdict, or that the specification of error presents it adequately, the contention is incorrect. First, it wholly ignores the nature of such assets which were $166,498.66 of cash, $60,668.65 in mortgages, bonds and accrued interest, and $87,626.88 in a promissory note and accrued interest. (Appellants' Br. 54). Second, since few taxpayers ever pay more federal income tax than is necessary, it is significant that Kelly, after consulting with tax counsel, filed a federal income tax return reporting $308,000 of the assets (he did not receive the final $6,794.19 taken by American) as having a fair market value of $308,000. (See Statement of Facts). Third, the Insurance Department of Arizona valued them at the $308,000 after a three and a half month examination and audit. (See Statement of Facts). Fourth, the purchaser American reported its cost at $308,000 in its books and records. (See Statement of Facts). And fifth, DePinto stipulated to the $308,000 in assets in the pretrial order of March, 1960, made no reservation therein

that such amounts did not represent fair market value, and added therein that as to him there were no issues of any material fact. (O. T. 237, 238, 240-242, 261). Thus, it appears that DePinto's concern about the fair market value of cash in the amount of $166,498.66 and notes, mortgages and bonds for the remainder of the $314,794.19 are of recent vintage particularly in view of his failure to put any testimony evidence in the record to the effect that such assets were worth less than $314,794.19. Possibly his problem was that on the one hand he was attempting to pump value into the United stock in his vain effort to persuade someone that its value several months before October 18, 1957 was high while on the other hand he wanted to argue that the assets taken on October 18, 1957 were not worth $314,794.19. In any event, if he had evidence that the bonds, mortgages and notes were not worth $314,794.19 along with the $166,498.66 in cash, it would have been an easy matter to place such evidence before the jury. Instead he chose not to do so, and now wishes to reargue the case in the court of appeals.

DePinto's suggestion, at page 25 of his brief, that because the witness Hammett testified United was in a deficit condition due partly to the $86,000 promissory note which was not an admitted asset, it follows that United could not have been damaged to the extent of the full $314,794.19, is an erroneous and inaccurate contention. The fair market value of an asset and its status as an admitted asset

are not the same thing. A life insurance company could own an oil well worth $500,000, but it would not be an admitted asset because of insurance law. It would not follow that directors who took the oil well could successfully argue, as DePinto attempts, that the corporation was not damaged because it was not an admitted asset.

Appellants' contention that some of the assets had a value to Kelly they would have had to no one else is specious. Their value to someone else would depend on Kelly's ability (financial) to pay them. Clearly he would have been the first person to reduce their value assuming they are the kind of assets which DePinto now argues they are.

Also, appellants' argument that it would have been an utter impossibility for the jury to have arrived at the value of the American stock is wrong. The foregoing Statement of Facts shows the several bases upon which the jury could find there was no value to the American stock. As shown there, the Insurance Department audit, Croydon, and the books and records of American all show that the stock was without any value. Further, Croydon testified that the American stock would "probably not be worthless if those mortgages were in there." (R.T. 371). Since those mortgages were not in there, he testified the American stock had no value. He also testified that the United stock had no value after the $308,000 was taken from United. (R.T. 367, 373). Thus, the only value the American stock

could have, if any, had to be found in the other assets and liabilities. The books and records of American, in evidence here, along with the testimony of Croydon, show that the liabilities of American exceeded its assets. (R.T. 364-368, Exh. 52, 53). These facts, along with the sudden birth of American at 4:45 p.m. on October 17, 1957, the day before its stock was sold to United with nothing more in its coffers than the promise of $75,000 by Sabo, shows there was no value to the American stock, and that Croydon had good reason to give it no value on his federal income tax return.

How the appellants can say, in the face of the foregoing evidence, if they did so argue, that there is no evidence to support the jury's verdict with respect to damages, is a matter for the court to determine. It is true that the jury reached a conclusion different than the one the appellants are advancing here. But a divergence of views between the losing party and the jury which rendered a verdict against him does not support a conclusion that no reasonable man could infer from the evidence before the jury that the damages were $314,794.19. What appellants are doing, at pages 24 and 25 of their brief, is presenting argument on the evidence which they view to be most favorable to their position as if the matter of damages were now before the jury or here on a trial de novo. But the evidence of record to which they refer was before the jury, and it drew different inferences and conclusions. It is too late for appellants to argue the

evidence. They are required to show that there is no evidence to support the jury's verdict as to damages. They have not attempted to do so.

h.

The Seventh Amendment Prohibits The Entry Of A Directed Verdict Once A Common Law Issue Is Tried To A Jury And The Jury Returns A Verdict For Plaintiff.

This court held in DePinto v. Provident Security Life Insurance Company, 9 Cir., 1963, 323 F.2d 826, that in a stockholders' derivative action it is necessary, in order to determine whether parties are entitled to a Seventh Amendment jury trial, to ascertain whether any of the claims asserted on behalf of the corporation are of a kind which, if asserted by the corporation, would be cognizable in a suit at common law. The court then held that where, as here, a claim of breach of fiduciary duty is predicated on underlying conduct, such as negligence, which is actionable in a direct suit at common law, the issue of whether there has been such a breach is a jury question. Thus, the court ruled that this case involved a common law issue to be tried to a jury.

The Seventh Amendment states:

"No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the

common law."

According to Crim v. Handley, 94 U.S. 652, 657, once a common law issue was tried to a jury, the appellate court's jurisdiction was limited to finding of errors of law in the proceedings and the award of a venire facias de novo, or new trial. There was no provision at common law for dismissal of such a case once a jury had returned a verdict for a plaintiff.

Rule 50 (b), Federal Rules of Civil Procedure, cannot change or supersede the Seventh Amendment.

Therefore, an appellate court is without power to order the entry of a directed verdict on behalf of the appellants.

Conclusion Regarding Appellants' Appeal From The Denial Of Their Motion For A Directed Verdict.

For each and all of the foregoing reasons, the appellants are not entitled to have the district judge reversed for denying their motion for a directed verdict. They, in addition, should not receive consideration on an appeal therefrom having insisted for eight years that they were entitled to a jury trial and that the district court had no power to grant partial summary judgment because there were issues, including proximate cause, which had to be submitted to the jury. The trial judge was even told that this court had ordered him to submit it to a jury regardless of any motion for partial summary judgment or otherwise. He did. DePinto lost.

Appellants Are Not Entitled To A New Trial Since The Admissions Of Fact Contained In The Pretrial Order And Exhibits Were All Material To The Issues Of DePinto's Negligence And Breach Of Fiduciary Duty.

Appellant DePinto objected to the admission in evidence of certain of the stipulated facts set forth in the pretrial orders as well as certain exhibits whose competence had been conceded in the pretrial order. Before responding to the merits of such objections, it is noted that appellants have not complied with Rule 18 (d) of the Rules of this court which requires that: " ... When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial court and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found." Insofar as the application of this portion of Rule 18 (d) is concerned, this court, in Queen Insurance Company Of America v. Larson, 9 Cir., 1955, 225 F.2d 46, 50, said:

> " ... This specification does not, as required by our Rule 18, quote the full substance of the testimony said to have been erroneously admitted. Hence we are not required to consider this specification..." (Underscoring supplied).

The rule applies also where the specification of error relates to the

rejection of evidence. See Matsuo Yoshida v. Liberty Mutual Insurance Co., 9 Cir., 1957, 240 F.2d 824,829, wherein this court stated:

> " ... appellants are precluded from raising the issue because of their failure to set forth the full substance of the rejected evidence in their appeal brief, as required by Rule 18, subd. 2 (d) of this Court ..."

See further, Tatum v. Tatum, 9 Cir., 1957, 241 F.2d 401,406; Elkins v. United States, 9 Cir., 1959, 266 F.2d 588,595; and Naval v. United States, 9 Cir., 1960, 278 F.2d 611,614.

Appellants have not quoted the full substance of the admitted or rejected evidence to which their specifications of error and points 2 and 3 of their opening brief are directed. Nor have they otherwise stated the "full substance" of such admitted or rejected evidence. Appellants' paraphrasing of such evidence in each instance contains significant omissions. Compare for example the appellants' statement of the "full substance" of Mr. Tompane's testimony (appellants' Brief, Appendix, pp. 15-16) with the testimony of Tompane submitted on an offer of proof. (R.T. 393-408). When that testimony is read, it is seen that appellants' statement is extremely misleading since Mr. Tompane actually testified he had never told anyone that he had a commitment for mortgages or any other securities, and that without such mortgages, the "plan" could not be consummated.(R.T. 407)

What appellants have done here, as they have throughout their brief, is argue the evidence most favorable to their position just as though this were not an appeal from a jury verdict and as if they were entitled here to a trial de novo.

The court is not required to consider appellants' specifications of error respecting the admission of evidence or the rejection of evidence because they have failed to comply with the provisions of Rule 18 (d) of this court's rules. However, should the court consider the specifications of error concerning admission of evidence, the following is offered for the court's consideration.

The objections of appellants to the admission of certain evidence stipulated as fact and contained in exhibits whose competency was conceded, with the exception of their objections concerning damages, is premised on their view of the case to the effect that "the only issue in this case was the question of whether or not the transfer of assets from United to American on October 18, 1957 was proximately caused by the negligence of DePinto in participating in the election of the Niesz group to the Board of Directors of United." (Br. 28). This is consistent with their view that none other of the many acts of negligence and breach of fiduciary duty set forth in the pretrial order and given to the jury in the trial court's instructions were proper issues in this case. Thus, they contend that the evidence of DePinto's continuing negligence over a period of years, the delegation of his

duties to Kelly during the entire period of his directorship in United, his role with Kelly as one of the promoters of Life Underwriters, Inc. showing his long association with Kelly, his failure to perform any of his duties as a director for several years, his signature to minutes without reading them, his signature to minutes stating he was there when he was not, his lack of knowledge of who the corporate officers were for fifteen months before the loss of October 18, 1957 occured, all of which showed the conditions under which Kelly was able to arrange with impunity for the transaction of October 18, 1957 without fear of detection or objection by DePinto, are prejudicial to him before the jury. However, the only issue in the case was not, as appellants wish, whether DePinto was liable for the one act of negligence which they focus on. The claims of negligent conduct and breach of fiduciary duty proximately causing the loss of October 18, 1957 were fully set forth in the pretrial order, and many of such claims were presented to the jury by the district court. (T.R. 141-146, 151-156, R.T. 570-571). DePinto has actually conceded that such objections have no validity because he did not assign as error the ruling of the trial court, which he originally objected to, that the pleadings pass out of the case with the entry of the pretrial order. He is making an indirect attack on that ruling despite the considerable body of procedural law which refutes his theory that the pleadings must be narrowly construed and

any variance therefrom is prejudice to him even though he has been on notice of the specific acts of negligence since 1960 when the case was first tried, when he rests his objections to certain evidence on the theory that the only issue in the case is as he sees it. DePinto is basing his appeal here on a theory of pleading which has not been accepted by the federal courts since before the federal rules were adopted in 1938. Appellants'quarrel here is not with the jury verdict based on the several claims of negligence and breach of fiduciary duty but with the Federal Rules of Civil Procedure and the philosophy of modern notice pleading rather than nice pleading.

The evidence which appellants object to is relevant and material to several of the claims made against him which were submitted to the jury. Their suggestion that it was not is somewhat like arguing that the failure of a bank president to lock the vault night after night for two years is not relevant to the issue of his negligence in leaving the vault open on the night when an employee finally yields to temptation and empties the contents of the vault. Such evidence was relevant and material to the issues of whether DePinto breached his fiduciary duty and was negligent and whether such breach or negligence was the proximate cause of financial loss to United. It is merely DePinto's opinion that his derelictions of duty for two years prior to and including October 18, 1957 were not related or material to the looting by Kelly and American on

October 18, 1957. The ruling that such evidence was relevant and material is correct. Appellants' objection that such evidence may have prejudiced DePinto is beside the point. The prejudice resulted from the facts themselves, and when facts are relevant and material the fact that a defendant may be prejudiced by them is not a ground upon which they can be rejected. A defendant must show the evidence is neither material or relevant. Prejudice is not enough.

With respect to appellants' objections as to certain evidence concerning damages, it is noted first that they contend that the page from the report of the Insurance Department of the state of Arizona was inadmissable as hearsay. The said page of the report was admissable under the exception to the hearsay rule provided by the Federal Business Records Act, 28 U.S.C.A. § 1732, enacted in 1958. LaPorte v. United States, 9 Cir., 1962, 300 F. 2d 878, 880; Wilson v. United States, 8 Cir., 1965, 352 F. 2d 889, 890; United States v. Re, 2 Cir., 1964, 336 F. 2d 306, 313; United States v. New York Foreign Trade Zone Operators, 2 Cir., 1962, 304 F. 2d 792. The second paragraph of section 1732 expressly provides that any lack of personal knowledge on the part of the maker may be shown to affect the weight to be given to the report "but such circumstances shall not affect its admissability", and thus refutes appellants' argument based upon the language cited by him from Olender v. United v. United States, 9 Cir., 1954, 210 F. 2d 795. Furthermore, even

the basis of appellants' objection is invalid. The recording official who made and prepared the report is the same man who conducted the examination and audit, who looked at the books and records which served as much of the basis of his report (in evidence here), and who did not glean his information second hand. (R.T. 252-267).

Appellants further contend that with respect to the federal income tax return of Kelly for the year 1957, Exhibit 83, and the testimony of Kelly with respect thereto, that DePinto was unable to cross-examine Kelly and the income tax return was hearsay. However, Kelly was cross-examined at great length,at the trial when the exhibit was admitted into evidence,by DePinto. (O.T. 480-517, 556, 557). Kelly was examined at great length with respect to the relevant portions of the said return showing he had reported the assets received from United by way of American at the $308,000. (O.T. 456-462). DePinto had a full opportunity to cross-examine Kelly with respect to both the return itself and his testimony relating thereto. Now that he was not available and his testimony was offered by DePinto on such ground at the last trial in June of 1965, appellants cannot complain when it is not possible to cross-examine him. His testimony was offered by DePinto at the trial, and he must live with the fact that he was not available in 1965 for cross-examination. The return is of course not hearsay since it was admitted after testimony from the man who filed the return and signed it. It is

also noted for the court that the tax attorney who prepared the return of Kelly, Mr. Frank Campbell, maintains a law office less than a block from the courtroom in which this case was tried. Furthermore, appellants' characterization of Exhibit 83 as being "incompetent" is suprising and unwarranted since (1) it is a certified copy of the original return provided by the District Director of Internal Revenue in Phoenix, Arizona with whom it was filed, and (2) such a characterization contradicts DePinto's stipulation in the pretrial order regarding the authenticity of the exhibit. (T.R. 92, 97).

Similarly it is difficult to understand the basis of appellants' statement, at page 30 of their brief, that Hammett's testimony respecting the financial condition of United on October 17, 1957 and December 31, 1957, and the effect of the October 18, 1957 transaction, was "hearsay and not supported by a proper foundation". It was established, through Hammett's prior recorded testimony, that Hammett was a Senior Examiner of the Insurance Department of the State of Arizona (R.T. 261), that he had conducted two prior examinations of United (R.T. 257), that he and an assistant had conducted the examination over a three and a half month period working eight hours a day for five days of each week (R.T. 258), that he had examined United's books and records (all of which in themselves constituted entries made in the regular course of business

and thus fall outside the hearsay rule) and made an official report thereon containing the necessary or incidental statements of financial condition (R.T. 257-259). Since Hammett's report itself is admissable under the exception to the hearsay rule provided by 28 U.S.C.A. § 1732, his testimony respecting its preparation and the contents of the report is equally admissable particularly since such testimony was originally subject to cross-examination by DePinto. (O.T. 1059-1081, 1083). Also, such objections now are extremely surprising since they were not made at the trial, and are made after it was agreed by DePinto's counsel that because Mr. Hammett, who was in court and under subpoena by appellee, was suffering from terminal cancer, he could therefore, for purposes of the trial below, be considered as beyond the reach of process. (R.T. 247, 251).

Finally, the argument presented by appellants in the middle of page 30 of their brief concerning what the value of the $308,000 in assets should be is not related to the question at hand of whether or not Kelly's return was admissable. Instead appellants are again arguing the evidence most favorable to their position just as if there were no jury verdict and they were here on a trial de novo. The argument is one which DePinto could have made and may have made to the jury, but it does not bear on the issue of whether the return was admissable.

For the foregoing reasons appellants are not entitled to a new trial on the ground that evidence was erroneously admitted by the district judge.

3.

Appellants Are Not Entitled To A New Trial Since The Evidence Rejected Was Neither Relevant Nor Material To Any Of The Issues In The Instant Case.

As noted in Point 2 herein the court is not required to consider appellants' specifications of error regarding the rejection of evidence because of their failure to comply with Rule 18 (d). Should the court, however, consider such specifications, it is submitted that each is without merit.

The rejected evidence to which the specifications of error are directed, whether it took the form of testimony, admission of fact, or exhibits, falls into several general categories. They are: (a) the "plan" respecting the procurement of mortgages for either American or United, (b) the "reputation" of the Niesz group (the looters) for integrity, (c) the attempted but unsuccessful prior effort to sell Kelly's stock to Insurance Corporation of America, and (d) the "investment" by Dr. Sabo in American. The following response will be to each of the categories rather than to each specific item.

The "plan", which allegedly envisioned a gift by some owner of

mortgages to American, was finally and forever shown to be nothing but a figment of DePinto's imagination when the trial court questioned Mr. Tompane. (R.T. 363, 407-408). On the offer of proof by DePinto, Tompane, the person who was said to have stated he would supply mortgages to American, testified that an essential element of the "plan" was the existence of the mortgages, and that he had never told anyone prior to October 18, 1957 that he had a commitment from anyone for the mortgages necessary for such a "plan." (R.T. 407-408). Furthermore, DePinto placed into evidence testimony of Croydon that the persons who, he claimed, would put mortgages into American, would take stock back for such mortgages, and thus there would not be any gift to the capital structure of American. (R.T. 372). Further, how would or could mortgages put into American, for which the transferors would receive stock in American, replace the $314,794.19 in assets of United which had been taken by American and Kelly on October 18, 1957? The "plan", according to Tompane, was non-existent, but even if it had existed would not have repaired the damage to United. As the trial court found, in its Supplemental Finding of Fact No. 30 in 1962:

> " Not only is it inherently improbable that anyone would contribute $314,794.19 gratis to United, but the testimony of Croydon, who was claimed to have authored the plan, was that such mortgages would never get to United Security Life.

" ... Assuming that some individual or corporation could have been induced to give $314,794.19 in mortgages to United or even to American, it would still be grossly negligent for those having a fiduciary duty to United to permit or cause the $314,794.19 transfer until other assets were in hand." (O.T. 1730-1731).

In short, DePinto claims the district judge should be reversed for rejecting evidence concerning a "plan" which was never carried out, which never existed except in the minds of looters who were looking for excuses after having been caught, which was denied by the person who was said to have committed such mortgages, which would not have repaired the $314,794.19 loss to United on October 18, 1957, and about which the appellant DePinto knew nothing at or prior to the loss on October 18, 1957. Such evidence is neither relevant nor material to the issues of whether DePinto delegated all of his duties to Kelly and is therefore responsible for Kelly's negligence, whether DePinto failed to require measures for the protection of United on and before the October 18, 1957 transaction, whether DePinto failed to exercise reasonable care to assure that adequate funds be obtained for United in exchange for its transfer of its cash and other liquid assets, whether DePinto failed to keep himself advised as to the important transaction of October 18, 1957, and whether DePinto's failure to discharge his

duties as a director for two years prior to October 18, 1957 caused the conditions which permitted Kelly to rob United of its assets. The relevance which DePinto urges is based on his theory that the only issue he was required to defend was whether DePinto negligently elected the Niesz group to United's board of directors, and the further contention that these men of integrity were simply engaged in a "plan". In states such as New York and California, these men of integrity would have been indicted and prosecuted for their "plan", and it would never have occurred to DePinto that he should urge such a "plan" upon a jury in a civil case as a defense to negligence and breach of fiduciary duty on his part.

Actually the evidence respecting the "plan" takes on an Alice in Wonderland aura when it is viewed from a distance. Yet this is what DePinto claimed was material and relevant. The heart of this argument by DePinto and several others in this appeal is that his sole duty as a director of United with respect to the loss of October 18, 1957 was to either conduct an investigation of the reputation and plan of each of the Niesz group or show that, had he conducted an investigation, he would have found they had a "plan." The fact is that had he conducted an investigation of the plan, he would have found that under the "plan", United was going to lose $314,794.19. What he wanted to do at the trial court was defend one lawsuit whereas

plaintiff, the district court, the jury, and the pretrial order were all involved in trying a different lawsuit. DePinto asks for a reversal and new trial so he can defend the lawsuit he would have prosecuted had his efforts to do so succeeded when he prepared the complaint for Provident which was rejected as not being bona fide by the trial court. Now that he has failed in the latter attempt to control the conduct of and extent of plaintiff's case against him, he is now appealing for the same result by shifting the level of his arguments to those of the days of nice pleading in the courts.

The argument appellants made at pages 34 and 35 of their brief with regard to the rejected evidence concerning the "reputation" of the outsiders who took United's assets demonstrates the irrelevancy and immateriality of such evidence. It is contended there that if DePinto had made an investigation of all of the facts and circumstances surrounding the transaction of October 18, 1957, he would presumably have learned of those facts and circumstances (the rejected evidence) which, he contends, discloses "that the Niesz group did not loot United and had no intention of looting it." By limiting his argument to the rejected evidence, DePinto has thus excluded the evidence of record which shows that the Niesz group did loot United openly, brazenly and intentionally. None of the rejected evidence can overcome the established fact that they did loot United. Nor can the rejected testimony overcome the fact that their intention, as manifested in

the evidence of record, was to loot United. See e.g. Exhibit 58 (Agreement with Kelly), Exhibit 5-H (Minutes of United), Exhibit 50-N (Minutes of American), and the testimony of both Kelly and Croydon that each knew several days before October 18, 1957 that the $308,000 in assets of United were to be used to pay Kelly for his stock in United (R.T. 331, 382), as well as the testimony of Croydon that merely putting the American stock into United could not satisfy the Insurance Department, and that no mortgages or other assets were ever placed in United to take the place of the assets removed on October 18, 1957 to pay Kelly. (R.T. 382). Also, Tompane's testimony that he never committed any mortgages to such group before or on October 18, 1957 provided evidence of the intention to rob United of its assets. (R.T. 407-408). However, even if the rejected evidence could somehow overcome the above evidence of record which shows the intention of the Niesz group, DePinto has not shown that such intention is relevant or material to any issue in this case. What he proposes to prove thereby is the "good faith" of those who took United's assets. But there is no issue of fraud either with respect to DePinto or those who took the assets. Thus, even if this case were viewed as one which involved, as DePinto contends, only the issue of his "vicarious liability" for the acts of the Niesz group, the "good faith" of such group would be irrelevant and immaterial. In short, under DePinto's vicarious liability theory,

the test is whether the Niesz group would be entitled to defend the charges of negligence and breach of fiduciary duty causing loss to United on the ground that they acted in "good faith". Since it could not, it is not available to DePinto even if the basis of his liability here were, as he claims, the concept of vicarious liability.

DePinto's liability here stems from his own acts of negligence as set forth in the pleadings and then in the pretrial order and then in the instructions to the jury. Thus, the good faith of those who took the assets, assuming they could be found to have acted in good faith, is not a defense to his acts of negligence. DePinto has not established the materiality or relevancy of such rejected evidence to the issues respecting his own negligence.

The district court also properly refused to admit the testimony of Kelly concerning what he was asking for his stock several months before he finally raided United's assets. Since the attempted sale to the Insurance Corporation of America was never consummated testimony with regard thereto is in no way probative of the fair market value of Kelly's stock in United at any point in time let alone on October 18, 1957, assuming the value of such stock, prior to the transfer of $314,794.19 on October 18, 1957, would have any bearing at all on the value of the American stock after the $314,794.19 was taken.

The exclusion of testimony that Sabo was to make an investment

of $115,000 in American, referred to at page 36 of appellants' brief under the subtitle "Evidence As To Damages", was properly rejected because such evidence was not offered to prove the value of American stock or otherwise directed to the damages issue. DePinto told the trial court that: "this testimony goes to the matter of good faith on the part of these directors." (R.T. 356, 357). When, at a later point in the trial, an offer of the same evidence was made, the trial court asked DePinto if he wished to enlarge the purposes for which it was offered, but DePinto failed to add any further reasons why it was offered. (R.T. 541-5, 541-6, 541-7). Furthermore, a reading of DePinto's argument in the third sentence of the second paragraph at page 30 shows that he studiously avoids any statement that such evidence was offered on the issue of damages. He is asking that the district judge be reversed for not having ruled on the proffered evidence as admissable on the damages issue when he (DePinto) offered it to prove the good faith of the Niesz group.

Appellants also object to the rejection of admitted fact No. 188 stating that $52,000 was sent to American by Sabo on October 18, 1957. First, there is nothing in the record to show why this fact was offered. (R.T. 520). However, since the $52,000 was part of the above $115,000 (Br. App. p. 15) and the $115,000 was offered to prove the good faith of the Niesz group, presumably it was

offered to prove good faith, and was therefore just as irrelevant as the $115,000 item. Furthermore, the evidence of record (Exh. 52 and 53) already showed that Sabo had transferred the $52,000 to American on October 18, 1957. The court below ruled that such ledgers could be shown to the jury or sent in if desired. (R.T. 604). Therefore, DePinto was not prejudiced even if the court below had erroneously rejected the testimony concerning the $52,000 from the prior recorded testimony. Next, standing by itself, the $52,000 transfer of funds from Sabo to American proves nothing insofar as the value of American stock is concerned. (R.T. 492).

Next, at page 36, appellants object to the rejection of testimony of Croydon which they characterize as "bearing on the value of United stock." A reading of such testimony shows that it does not prove or tend to prove the value of the loss realized by United when its assets were taken or the value of the American stock. What has the value of the United stock, prior to the loss of its assets, got to do with the value of the American stock? Clearly such proffered testimony was neither material nor relevant. The only testimony which could be deemed relevant or material, if anything could, would be the value of the United stock after the loss on October 18, 1959, and on that count DePinto's own witness Mr. Croydon testified:

"Q. Now, I understand you to say that at the end of

October 18, 1957, the 38,000 shares of United Security Life stock would have no value?

A. Without the mortgages, they would have no value.

"THE COURT: You didn't have them on that day, did you, at the end?

THE WITNESS: No, sir. " (R.T. 373).

In light of this testimony by Mr. Croydon, DePinto could not put on evidence through the same witness which would impeach him or attempt to show value when his witness testified there was none.

The offer of the Hammett testimony regarding value of United stock was properly excluded because it violated the previous ruling that all of a witness' testimony should come in at one time in order not to confuse the jury (R.T. 265, 267, 273, 544), did not prove any issue in the case, and was testimony of a witness which DePinto objected to himself. (R.T. 544-545). Also, what is the relationship between the value of the United stock, prior to or after October 18, 1957, and the value of the assets lost by United or the value of the American stock? It is no defense for a director of General Motors, who permits its assets to be transferred to a newly formed corporation negligently, after which the assets are distributed to 38% of General Motors' stockholders, to contend that the damage must be reduced by the value of the General Motors stock turned over to the new corporation by such shareholders in exchange for the assets. Minority shareholders

have not been permitted to do such a thing in this country for nearly three quarters of a century, and the cases have stopped talking about the matter since the rule is so well recognized. The only entity entitled to a corporation's assets, until two-thirds of the shareholders have approved a liquidation, is the corporation itself. If a liquidation is voted, the creditors and policyholders must be paid first, and, if there is anything left, it goes to the shareholders. No minority shareholder group can defeat this rule by doing it anyway and then arguing that the damages against them must be reduced by the value of their stock. They can have their stock back after they replace the cash and corporate assets,as the directors liable for United's loss are welcome to the 38% of the United stock(which appellants say had value even though all of United's assets were taken from it), but not a reduction in the recovery against them.

The district court also properly excluded the testimony of Gregory saying that Provident had obtained loans in 1959 and issued certificates of contribution therefor. (R.T. 529). How could a loan to a successor life insurance corporation, several years after 1957, prove anything other than that the outsiders had a "plan" to borrow money to replace the lost assets? If the evidence of such a nature relates to the damages sustained by United in 1957, the district court was unable to find it.

The District Court Did Not Err In Its Instructions To The Jury.

Again the appellants' contention respecting alleged error in the giving of instructions to the jury follows from their view that the only issue is as they see it on the theory that the complaint in intervention may only be looked to,and must be narrowly construed, and is controlling over the pretrial order rather than vice versa. That is, they are again attacking the validity of the pretrial order, the notice concept of pleading, and the Federal Rules of Civil Procedure without having assigned as error the ruling of the district court with respect to the pleadings passing out of the case.

The instructions which appellants object to at page 37 of their brief were warranted by reason of plaintiff's contentions in the pretrial order which presented a series of acts of negligence and breach of fiduciary duty and the superseding of the pleadings by that pretrial order. Based on the three issues presented to the jury in the form of questions concerning negligence, proximate cause, and the amount of damages, plaintiff was entitled to have the jury instructed as to the several acts of negligence as well as the several acts of breach of fiduciary duty which he claimed proximately caused the loss of October 18, 1957, and the jury was entitled to determine whether any of such acts or all of them were the proximate cause or causes

of the October 18, 1957 loss. DePinto did not have the right to have a corporation's claims of breach of fiduciary duty and negligence tried as though there were only one single act of negligence or breach of fiduciary duty when the plaintiff had set forth numerous such acts. It is appellants' opinion only that those claimed acts of negligence and breach of fiduciary duty, other than the act of electing the looters to the board, cannot be heard by the jury. There is no procedural or substantive law which agrees with them, and they have cited none. There is not a case citation found in their argument on evidence admitted or rejected. The reason is that all of those arguments rest on their assumption that the only case DePinto was required to defend was the case he preferred to defend. And the reason DePinto adopted such an assumption was that he had no defense to the other acts of negligence and breach of fiduciary duty in view of the facts which he had admitted prior to the preparation of the pretrial order in response to requests for admissions of fact. That is, appellants' theory of the case is required because of the undisputed facts which were contained in the pretrial order and read to the jury. The thrust of their argument here is that instructions concerning many of those facts read to the jury were improper because they do not coincide with their view of plaintiff's case. What they are attempting to do is control the presentation of plaintiff's claims indirectly without having directly assigned as

error the setting forth of plaintiff's claims in detail in the pretrial order and the district court's ruling that the pleadings passed out of the case upon entry thereof. DePinto is not living with that order here, and yet he has not appealed from it. Worst of all much of his premise rests upon an argument from the evidence that "there was no evidence introduced to support the allegation of Count VI," a count in one of the pleadings which passed out of the case upon the entry of the pretrial order. Does DePinto know that the jury agreed with him? Furthermore, his argument rests on his interpretation of Count VI's words "caused" and "permitted". He says none of the evidence shows DePinto breached his fiduciary duty by causing or permitting the transfer of United's assets on October 18, 1957. The evidence shows that his breach of fiduciary duty in several respects did cause such assets to be transferred, and did permit such transfer.

All of page 38 of appellants' brief is a reiteration of the same arguments that the instructions misstated plaintiff's claims to the jury because such claims are limited to a pleading (the complaint in intervention only) which pleading must be narrowly interpreted as DePinto reads it.

Appellants contend at page 39 of their brief that the instruction set forth therein "is highly prejudicial to defendant for the reason that there is not a scintilla of evidence that he knew that the Niesz group intended to perpetrate an illegal transaction, nor is there any

evidence whatever to support the conclusion that he was aware of any suspicious circumstances which would have required an investigation on his part." However, appellants overlook the entire language of the instruction that a director cannot remain silent and inactive when "in the exercise of reasonable care by him, he should know, that an illegal transaction, or one potentially harmful to the corporation is being attempted by officers or other directors of the corporation." In that light the instruction was proper.

Appellants' objections to the instruction concerning the liability of a director who delegates his duties to another stems also from his view that such was not an issue here. The suggestion that such instruction was an attempt to hold him liable for the acts of the Niesz group is incorrect. The record shows DePinto delegated his duties to his friend Kelly and was no more than a figurehead or dummy director, and is therefore liable for the negligence and misconduct of Kelly about which there is no dispute.

The appellants' objections, at page 41, are directed to the instruction respecting when a resignation of a director becomes effective, and are based on his view of the evidence that there was no issue with regard to whether such resignation was effective prior to the adoption of the resolution transferring United's assets on October 18, 1957. As shown herein, and in the Statement of Facts, there was a serious question in that regard. It was therefore proper to instruct

that: "A resignation specified therein to take effect upon acceptance does not become effective until it is accepted." Had the jury not been so instructed, they might have concluded from the document that DePinto's resignation occured on October 17, 1957 whereas it was stipulated that DePinto's resignation was accepted October 18 "about 4:15 p.m." (R.T. 518). There was no stipulation, as appellants appear to argue, that DePinto's resignation was accepted prior to the time when the board of directors formally adopted the resolution respecting the transfer of United's assets to American. That is only appellants' conclusion based on the placement of the paragraphs in the unsigned 4:15 p.m. minutes of October 18, 1957. However, since they were unsigned, and DePinto testified that he did not sign the 4:00 p.m. minutes of October 18, 1957 until the following day, October 19, 1957, there was a question of fact before the jury as to when DePinto's resignation was accepted in relation to the transfer of United's assets to American. (R.T. 500).

Appellants' objection to the trial court's instruction respecting the responsibility of an absent director disregards the facts which make it applicable to DePinto. His objections are again based on his assumption that it is "undisputed" his resignation was accepted at the 4:15 p.m. meeting before the resolution was adopted transferring United's assets. Furthermore, DePinto was a director at the time of both the 4:00 p.m. and 4:15 p.m. meetings. Until his resignation at the 4:15 p.m. meeting, during the meeting, he was a director.

The Trial Court Did Not Err In Refusing To Give DePinto's Requested Instructions Numbered 4, 5 And 8.

The irrelevancy and immateriality of the background and reputation of each of the group who took United's assets on October 18, 1957 has already been set forth. DePinto's objections to the refusal of the district judge to give his fourth instruction is also dependent on that contention, and is therefore without merit. His instruction, as he admits, would "require the jury to conclude that the acts of the Niesz group (those who took United's assets) was a superseding cause of harm to United which relieved DePinto from responsibility." (Br. 43). Such an instruction is erroneous on the law, and would be erroneous on the facts since the jury was entitled to determine as a matter of fact whether DePinto resigned after or before the transfer of assets. The instruction does not permit the jury to find liability on any of the other bases given to them in the instructions and set forth in the pretrial order, and is therefore erroneous.

Nor did the district judge err in refusing to give that portion of his requested instruction No. 5 set forth at page 44 of his brief. First, the grounds relied on in attacking the refusal to so instruct are not the grounds which appellant DePinto urged at the trial. (R. T. 596). Second, the argument is without merit. The statement in

the requested instruction is a misstatement of law (see the material herein at Point 1 discussing Barnes v. Andrews, supra,). The instruction is not applicable to the facts of this case and is actually inconsistent with the law of proximate cause as the district court did instruct. The trial court not only properly instructed as to proximate cause but also as to the burden of proof in this case, and the requested instruction would be inconsistent with the law as given in those instructions.

Insofar as appellants' requested instruction No. 8 is concerned, appellants are again urging grounds in support of the alleged error regarding the instruction which were not urged before the trial court. (R.T. 596-597). When appellants say that "when the matter of proximate cause is explained to a jury, the party defendant is certainly entitled to have the matter explained to the jury as fully, completely and clearly as possible", they are overlooking the scope and length of the charge which was given regarding proximate cause. (R.T. 574-576). It may be that appellants' narrow view of what the issues are here permits him to believe that the language cited by him from Salt River Valley Water Users' Ass'n v. Cornum, 1936, 49 Ariz. 1, 63 P.2d 639, is applicable here, but in the light of the issues which were actually tried and presented to the jury, the instruction would have been confusing, misleading and wrong in view of the absence of the supervening cause upon which it is predicated.

Appellant DePinto's Counsel Had Notice Of And Approved The Answer To The Jury, Did Not Make Exception Thereto, And The Answer Was Not Prejudicial Being Merely An Amplification Of An Earlier Instruction To Which Appellant Did Not Object.

Of the several attacks which have been made by appellant DePinto on the integrity and fairness of the visiting district judge who heard the instant case, none has been more unfair or grossly misleading than the innuendo, implications, inference, and direct statements contained in the argument that the district court prejudiced appellant DePinto by the manner and substance of his answer to a communication from the jury. Because these attacks are endemic to appellant DePinto's conduct of his defense here, the court is earnestly asked to bear with the following full statement, in context, setting forth the facts concerning the currently objected to answer by the district judge.

Prior to retiring to consider its verdict, the jury was instructed that:

" The essential issues of the case are:

1. Is defendant DePinto chargeable with negligent breach of fiduciary duty in any one or more particulars asserted by

plaintiffs? If so,

2. Did such negligent breach of fiduciary duty of defendant DePinto proximately contribute to causing financial loss and damage to United Security Life, a corporation? If so,

3. What was the amount of such loss and damage to United Security Life?" (R.T. 571).

Later, after being instructed on the negligence and proximate cause aspects of the case, the district judge instructed the jury that:

" The claimed items and amounts of assets transferred to Kelly consist of cash by check or bank certificates of deposit in the sum of $166,498.66; second, promissory notes and accrued interest thereon, totaling $87,626.88, and third, mortgages, bonds, and accrued interest thereon in the amount of $60,668.65." (R.T. 587).

Within an hour and a quarter after the jury retired, it sent the following question to the district judge:

" If the jury find in favor of the Plaintiff, is Dr. DePinto responsible for the full amount or whatever the jury specifies? (T.R. 236,292).

Thereupon, the district judge consulted with and obtained the approval of counsel for appellant DePinto and for appellee to the following answer:

" The full amount of damages sustained as found by the jury." (T.R. 293).

At about 6:00 P.M., the jury sent the following communication to the district judge:

" 1. Jury wishes a repeat of the 3 factors to be used in judging for the plaintiffs. (Underscoring supplied)

2. The verdict lists the defendants as:

Provident Life Ins. Co., Angus J. DePinto, et al,

Our impression from the trial is that Dr. DePinto was the only defendant. Please clarify." (T.R. 237).

Thereafter, the answer which is now objected to by appellant DePinto was discussed by the district judge with Mr. Herbert Mallamo, counsel for appellant DePinto, and with counsel for appellee. The following was approved by both Mr. Mallamo and by counsel for appellee, and sent to the jury:

" Answering your first inquiry:

The three (3) ultimate issues are:

1) Was defendant DePinto negligent in performing his fiduciary duties in one or more of the particulars asserted by plaintiffs? If so,

2) Did such negligence of defendant DePinto proximately cause or contribute to causing loss or damage to United Security Life? If so,

3) What was the amount of such loss or damage?

The three items of claimed damage are:

1) Cash, by check or bank certificates of deposit - $166,498.66

2) Promissory notes and accrued interest thereon - 87,626.88

3) Mortgages, bonds and accrued interest thereon - 60,668.65

Total - $314,794.19

Answering your second inquiry:

There are other defendants in the case, but the present trial is concerned only with the liability of the defendant DePinto." (T.R. 238).

Subsequently, the jury deliberated for several hours before returning its verdict.

When the jury returned its verdict, Mr. Mallamo was present in court along with counsel for appellee, the district judge, and Mr. William Loveless, Clerk of the Court. Upon receipt of the jury's verdict, the district judge, in the presence of all counsel including Mr. Mallamo, orally ordered that the communications from the jury and responses, marked No. 1 and No. 2, be filed by the clerk and that the record show the responses were taken up with counsel and are proper, and that communication from the jury marked No. 3 be filed. (T.R. 293). Mr. Mallamo remained silent, and made no statement at all that appellant DePinto objected to or had objected to the response to the jury's second communication.

Later, and after July 6, 1965, when his Amended and Supplemental Motion for Judgment in Accordance With Motion for Directed

Verdict was filed, appellant DePinto's counsel filed a memorandum in support thereof, and which states at page 24 thereof:

> " The Court called defendant's attorney by telephone and advised him that he intended to answer the jury's note by informing them as to the three factors - negligence, proximate cause and damages, and he further intended to advise them of the three items of damage. The Court did not read to defendant's attorney the note which was transmitted to the jury. After considerable discussion and importuning by the Court, defendant's attorney indicated to the Court that it would be all right to mention the three factors - negligence, proximate cause and damages, and also the items of claimed damages. "

Thus, appellant's counsel has conceded, after the event, that he told the district court it was all right to mention the three items of claimed damages.

Therefore, under the case cited by appellant DePinto, Fillippon v. Albion Vein Slate Co., 250 U.S. 76, the written supplemental instructions to the jury were proper. The reason is that Fillippon, supra, said that instructions to the jury are valid if sent after notice to counsel and an opportunity to object. Here Mr. Mallamo had both notice and an opportunity to object to the response at the time it was discussed with the district judge and again in open court. Instead he told the district judge it was all right to send a response mentioning

the three items of claimed damages to which appellant DePinto now objects.

The fact that no exception was taken to such response to the jury, standing by itself and ignoring the fact of appellant's approval of the response, is sufficient to strike down his request that the district judge be reversed on this issue. Macartney v. Compagnie Generale Transatlantique, 9 Cir., 1958, 253 F.2d 529, 525.

In any event the response complained of was not prejudicial. The district court had earlier instructed the jury as to the three items of claimed damages, and no exception was then taken by DePinto. Therefore, when the same instruction was again used to answer a question from the jury asking for a "repeat of the 3 factors to be used in judging for the plaintiffs" after first setting forth the essential issues of the case, the defendant was not prejudiced. If anyone was prejudiced it would have been plaintiff. Why? Because the jury did not ask for the three issues in the case which were given to them first in the response. They asked, after first having asked whether Dr. DePinto would be responsible for the full amount or whatever the jury specifies, for a repeat of the 3 factors to be used in judging for the plaintiff. However, plaintiff recognizes that the first part of the response was an effort by the district court to give an answer which did not favor either side, and that it was a noncommittal reply to a question or request which plaintiff thought indicated a clear

judgment in favor of plaintiff with the only question being: what are those three items of claimed damages about which you instructed us earlier? American Life Ins. Co. v. Florida Anglers Ass'n, 5 Cir., 1950, 185 F.2d 460, 463, stated:

> " ... If error was committed by the Court in answering a question for the jury in the absence of counsel for the defendants, it was error without injury, since the statement made was substantially a repitition of matter covered by the oral charge."

The request from the jury, the form and substance of the reply, the consultation with and approval from both counsel, all show that there could not have been error. If the answer was as bad as appellants now say, why did qualified counsel approve and tell the district judge the three items of damages could be mentioned in the response? Also, it could not have practically invited the jury to return a verdict since they later sent in a communication telling the court they were apparently deadlocked. (T.R. 239).

What appellants have done with this assignment of error is to try to stimulate the court into speculating unconsciously about what the jury did, whether another jury would do differently, how it reached its verdict, and so on. That is the only plausible explanation which can be given for the appellant having made the misstatements offered in support of his contention that he was

prejudiced by the response which he approved and did not take exception to at the time. That such speculation is his hope is shown by the final paragraph of such argument in which he says the verdict probably would not have been entered in the absence of such a response.

In light of the foregoing material, it is wrong for appellant to suggest to the court that the first time the jury ever heard of the three items of damage was in the said response. He does that by saying that "nowhere in the evidence is there any reference to the three items of claimed damages." Appellant knows, however, that those portions of the pretrial conference order setting forth the assets and amounts thereof which had been lost on October 18, 1957, which items were broken down into cash, promissory notes, and mortgages, bonds and accrued interest thereon all totaling $314,794.19, were read to the jury and later divided into three categories, as shown earlier, by the district court in its instructions to the jury. (R.T. 212-214, 587). It was also wrong for appellant to tell the court that the district court's response was taken up with his counsel, but not to go on and tell the court of his approval followed by a concession thereof. To leave the implication that there was a lack of communication between his counsel and the district under the foregoing circumstances is equally erroneous.

The district judge should not be reversed for the said response.

The Judgment Entered Herein Was Not Excessive.

Although this is a stockholders' derivative action in which the judgment rendered is in favor of the injured corporation or its successor, the trustee in bankruptcy is asking that the claim herein against the assets in the bankruptcy court be reduced from the $314,794.19 returned by the jury in a general verdict to $80,856. His argument is that 42,548 shares of United's stock have been cancelled, and therefore the judgment should be reduced by 42.5 % to $180,856. Then he says the $100,000 paid by the Duhame Estate, in settlement of separate claims of $177,863.84 for damages to United occurring prior to the date when it lost the $314,794.19, should then be applied to reduce the judgment further to the sum of $80,856. Thereafter, he contends that interest allowed from October 18, 1957 is erroneous. Thus, the trustee in bankruptcy says that the maximum claim the judgment creditor here can have against the bankrupts' assets is $80,856. If the trustee is right, then the approximately $725,112.03 of general creditors' claims, arising after the 1960 and 1962 judgments entered herein, would be satisfied from the bankrupts' assets of $754,109.44 whereas should the judgment be affirmed, the policyholders and stockholder beneficiaries thereof would recover if the judicial lien herein was not declared null and void. In the latter event, the recovery herein is about

thirty to thirty-five cents on the dollar assuming the assets produce the full $754,109.44.

Therefore, in balancing the equities while evaluating some of the equitable arguments which the trustee in bankruptcy makes here, the court is asked to weigh in its scales that commercial general creditors, including Massachusetts Mutual Life Insurance Company, who loaned nearly $700,000 to another creditor, Trosco Land, Inc., which is not likely to be recovered therefrom, are here in the person of the trustee in bankruptcy and others, attempting to collect those claims by reducing or eliminating the judgment rendered herein for the third time for the benefit of United's stockholders.

a.

The Cancellation Of 38,798 Shares Of United Stock In 1959 And The Surrender Of Certificates Of Contingent Interest From 3750 Shares Of United Stock Does Not Entitle The Trustee In Bankruptcy To A Reduction In The Judgment To $180,856.

Since intervenor-appellant's opening brief has reiterated some of the same arguments made in appellant DePinto's opening brief in DePinto v. Provident Security Life Insurance Company, 9 Cir., 1963, 323 F.2d 826, Docket No. 18245, appellee refers the court to pages 43 through 62 of appellee's brief in No. 18245.

Additionally it is submitted that the doctrine of restitution

is neither applicable here nor should be applied if applicable.

Restitution does not apply because the surrender of the 38,798 shares of United stock by American did not restore United's $314,794.19 or its equivalent. The United-Provident merger agreement stated, in paragraph 3, that Provident had, at the date of the agreement, issued 104,000 shares of its capital stock for $2.00 a share of which $ .30 a share was allocated to expenses and compensation and $1.70 being the proceeds to Provident. Thus, the Provident stock had a fair market value of no more than $2.00 per share although it was actually only worth $1.70 since that was all that found its way to Provident. Assuming the best from appellants' point of view, the Provident stock had a fair market value of $2.00 a share. Therefore, the total value of all of the United stock on the date of the merger is easily determined because the merger agreement provides in paragraph 6 thereof that each holder of 30 shares of United would receive 1 share of Provident stock and in paragraph 5 thereof that the total outstanding common stock of United was 100,000 shares. Consequently, the maximum number of shares of Provident stock to which the shareholders of United were entitled was 3,333 (100,000 of United divided by 30 equals 3,333). Since the 3,333 shares of Provident stock could not be worth more than the $2.00 per share, this means that the total received by the United shareholders could not exceed $6,666. Consequently, since 38.9 per cent of the United stock was cancelled, it follows that the maximum

value which could be attributed to the cancellation of the 38,798 shares of United stock is 38.8 % of $6,666 or about $2,593.07.

It is this $2,593.07 which appellants ask the court to deem to be restitution for the $314,794.19 lost by United on October 18, 1957. Further, they ask that it be so deemed although it did not restore the status quo and occurred in 1959 after the company had been bankrupted by the negligence and breach of fiduciary duty of the directors including DePinto. The person who takes two tickets to the last game of the World Series along with the rightful owner's new Ford does not restore the status quo if he returns the tickets a week after the game is played along with a damaged Ford. Restitution is not a doctrine which permits such a result to be invoked in defense of a claim against the person taking property. The argument appellants make here was made in the district court, and the Motion to Strike Defenses set forth the above figures.

Nor should the doctrine be applied as a matter of equity because he who seeks the aid of equity is required to do so with clean hands. Here the person for whom the trustee in bankruptcy speaks, appellant DePinto, has written a letter to the district judge, participated with Provident in the filing of a complaint in Provident's name although the complaint was prepared by DePinto and exculpated him from liability, signed and filed an affidavit of bias and prejudice

against the district judge five years after the latter was assigned to the case and which affidavit was based solely on rulings in the case, lied at the last trial below on a significant aspect of the claims against him (R. T. 499, 504, 505), admitted under oath that he had opened bank accounts in the names of others to avoid writs of attachment at a time subsequent to the entry of judgment here, and asked this court for an injunction in Docket No. 20308 here, a related case, to prevent execution of the judgment herein while at the same time he had an injunction in his pocket which had been obtained without notice from a Referee in Bankruptcy.

The contention of the trustee in bankruptcy that the judgment be reduced because less than 100, 000 shares of United stock remains outstanding due to the said cancellation assumes that the suit here is a class action on behalf of only the remaining shareholders of United and that only they have an interest in the judgment entered. While it is true that such judgment may ultimately be for their benefit, it is not true that they only have an interest therein. There are two pending lawsuits in the U.S. District Court for the District of Arizona in which claims are being made against United and Provident by former policyholders of United, and in which Provident has denied it assumed liability of the type asserted therein. Walker v. Provident Security Life Insurance Company, Civil No. 4069, and Mauser v. Provident Security Life Insurance Company, Civil No. 4070. These

claims total $119,099.37, and they cannot be satisfied, if sustained, from Provident Security Life Insurance Company even if Provident's disavowal of assumption thereof is rejected. Further, the terms of the merger agreement between United and Provident permit the latter to deduct from the judgment here any proper charges against said recovery. Thus, it is clear that two California citizens, former policy-holders of United, also have an interest in the judgment rendered below in Provident's favor.

The argument is also unsound because the district court has not rendered a decision in the pending suit to declare the United-Provident merger null and void, and there is pending therein a motion to amend the complaint by setting forth a cause of action based on violations of the Securities and Exchange Acts as well as regulations of the Securites and Exchange Commission. The parties are also attempting to negotiate a disposition of the case which may set aside the merger. In any event the corporate demise of United is still an open question in other litigation even though for purposes of ruling on jurisdictional questions here its merger with Provident must be accepted as the court ruled. Should United's continued existence be determined later, the reduction of a judgment in its and its successor's favor on the assumption that it no longer exists or will benefit from the full judgment here would damage its property rights severely.

Next, assuming that only the 57,452 shares of United have a

property right in the judgment herein, would it be, as the trustee in bankruptcy contends, "grossly inequitable and unjust" for such stockholders to recover 100% of the loss realized by United on October 18, 1957? First, they would not get the full $314,794.19 even if no policyholders' claims were allowed against it. Why? Because six years ago the district court awarded one-fourth of the judgment collected as legal and accounting fees, and it is reasonable to assume that,in view of the additional counsel required since then as well as the additional effort expended, the district court would not reduce the award. In addition there are litigation costs not recoverable from the judgment debtor under law, and such amounts,if allowed, would further reduce the recovery in a much smaller amount. Thus, it is not likely, in the best of circumstances, that such shareholders would realize more than $215,000 of the $314,794.19. This is about $35,000 more than the $180,856 which the trustee in bankruptcy says the judgment should be reduced to here. Would this $35,000 result in a payment which would be "grossly inequitable and unjust"? It hardly seems so in view of the fact that such shareholders also lost their equity in a going concern as a result of the negligence involved here.

Also, and viewing the question in the context of the bankruptcy proceedings, how realistic is it for the trustee in bankruptcy to claim that such stockholders would ever get such $35,000 more than the

$180,856? With total debts of $2,113,931.93 and total assets of $754,109.44 listed in the DePinto bankruptcy proceeding, it is more than likely that, if the judgment for $314,794.19 is affirmed here, the trustee in bankruptcy will then file a petition in the bankruptcy court seeking an order declaring the judicial lien obtained herein to be null and void. Should that succeed, the trustee in bankruptcy knows that the shareholders of United or any other claimants to the judgment herein would be fortunate if they recovered thirty to thirty-five cents on each dollar of the $314,794.19 judgment.

The trustee's reliance on the cases cited at pages 50 and 51 of his opening brief is misplaced. Each of those cases, with the exception of Stanton v. Schenck, (S.Ct. N.Y. 1931) 251 N.Y.S. 221, was responded to at pages 49 through 61 of appellee's brief here in No. 18245. Insofar as Stanton v. Schenck, supra, is concerned, the case does not aid appellants. It was a class action by shareholders for breach of fiduciary duty to all shareholders.

Appellants here are faced by the law of this case - that this is a stockholder's derivative action, and the recovery in such cases is, as is shown more fully at pages 43 through 61 of appellee's brief in No. 18245 here, in favor of the corporation. The first reversal was based on the absence of an indispensable party in a stockholder's derivative action, a ground raised by DePinto. He won. If he had lost, he could be heard to argue now this was a different action.

b.

The $100,000 Payment By The Duhame Estate, In Settlement Of $177,863.84 In Damage Claims For The Period Prior To October 18, 1957 When United Lost The $314,794.19 Which Is The Basis Of The Jury Verdict Against Appellant DePinto, Does Not Entitle The Trustee In Bankruptcy To A Credit Of $100,000 Against The $314,794.19.

Prior to the beginning of the trial below, the Duhame Estate, at a conference with appellee's attorneys and the district judge, sought to settle their liability herein for $100,000. At that conference, appellee's counsel advised the district judge that they refused to accept such a settlement unless it was in settlement of the $177,863.84 in claimed damages sustained by United during the period from June 30, 1956 through October 17, 1957, the period prior to the date when United lost the $314,794.19 in liquid assets. On Friday, June 11, 1965 the Duhame Estate formally announced its offer to the district court. (R.T. 147). Appellee's counsel immediately reiterated the said condition with the following statement:

" If your Honor please, I think what Mr. Cavanaugh said should be supplemented by the fact that the acceptance of this offer by the plaintiffs is contingent upon an allocation of the funds in our opinion. It should be all to the first cause of

action. By that I mean the claim prior to October 17, 1957, certainly no less than $95,000.00 of it to be allocated to that, and whatever allocation is deemed by the Court to be appropriate not in an amount to exceed more than $5,000.00 to the other two claims, and we would petition and we would - we will present a formal petition to your Honor. But in order that the matter be disposed of now, we would petition that your Honor approve the settlement subject to the condition that I just stated, and with the direction that the payment be on account of that first claim and be allocated to that first claim, and if that condition is approved and such allocation is made by the Court, then we would recommend to the Court that the settlement be approved as fair and reasonable. I don't think it is any bonanza, but I think it on the minimum side, fair and reasonable, and in order to avoid further litigation with the Duhame defendants, we recommend that it be accepted and that the money be paid into court to be distributed pursuant to the court order.

" The Duhame defendants will also surrender their certificates of participation, which may or may not have any value, but if there is any value, that value should be assigned in precisely the same way as the settlement itself." (R.T. 148, 149).

Thereupon, appellant DePinto stated through counsel " that so far as the settlement is concerned, the other defendants have no control or really have no voice in whether a settlement is made or whether it isn't", and that " I am not questioning the right of the parties to make settlement." (R.T. 151). Following that statement, appellant DePinto argued that there " is no other claim that has been formally or otherwise legitimately made in this case" other than the $314,794.19 claim relating to the October 18, 1957 loss by United, and therefore no allocation could be made by the district court. (R.T. 152).

The district court ruled that the $314,794.19 claim of damages occuring on October 18, 1957 was not the only claim; that the claim for damages for the period prior to October 18, 1957 had been vigorously presented and pursued, referring to rulings with respect thereto insofar as the pretrial order was concerned; and that the settlement was approved with the $100,000 being allocated, as conditioned by plaintiff's acceptance, to the $177,863.84 damage claims for the period from June 30, 1956 through October 17, 1957. (R.T. 155, 156, 157). In so ruling the district judge also relieved the remaining defendants, including appellant DePinto, of any need to defend further against the $177,863.84 damage claims for the period prior to October 17, 1957 by striking such claims from the balance of the trial. (R.T. 158, 159). One of the reasons given for so ruling was

hat appellant DePinto and the other defendants had previously contended they would be prejudiced by any reference at the trial o such earlier amounts of claimed damages, and that by so striking the claims upon settlement of the $100,000, the possibility of prejudice would be removed. (R.T. 158, 159).

In short, not only did the district court credit one joint ortfeasor (DePinto) with a payment made by another joint tortfeasor Duhame Estate), but it credited appellant DePinto with the entire 177,863.84 by virtue of striking the claims from the balance of he trial after application of the $100,000 on the said $177,863.84 laims for the period prior to October 18, 1957. Thus, the cases ited by appellant DePinto at page 52 of his opening brief are not ertinent.

Nevertheless, DePinto argues that the only claim pending gainst Duhame at the time of the settlement was the $314,794.19 ost on October 18, 1957, and that therefore the $100,000 payment nust be applied thereto so that he is entitled to a credit. This is ncorrect on the merits, as will be shown, but before doing so the ppellee challenges the standing of appellant DePinto to object to settlement made by Duhame of all of the claims made against it. hat is, if the Duhame Estate, against whom appellee had made claims or the period prior to October 18, 1957 of $177,863.84, for October 8, 1957 of $314,794.19, and for the period subsequent to October 18,

1957 of $60,695.60, chose to settle all of those claims for $100,000, and the appellee accepted such offer only on the condition that all of the said sum be applied in payment of the $177,863.84 damage claims for the period prior to October 18, 1957, where does appellant DePinto obtain standing here to question, interpret, challenge, or modify such settlement? Had appellee filed action against the Duhame Estate for only the $177,863.84 claimed damages for the period prior to October 18, 1957 and a separate action against DePinto for the $314,794.19 lost on October 18, 1957, DePinto would have no right or claim to a credit on a $100,000 settlement therein. And where the Duhame Estate settled three classes of claims on the foregoing basis, what right would DePinto have here in this action to argue that in the Duhame action there was only one claim pending (the $314,794.19)? That issue has been foreclosed in the Duhame action, and DePinto cannot assert here, in a separate action, arguments which the Duhame Estate does not make, and which they chose not to make when it was decided to settle their liability. The settlement with the Duhame Estate was predicated on the recognition and validity of the pre-October 18, 1957 damage claims of $177,863.84, and DePinto is foreclosed from attacking that recognition in this action. As far as the record is concerned, the Duhame Estate did not state why they settled the claims against them. Can DePinto point to evidence that demonstrates that the Duhame Estate did not decide to settle for the $100,000 precisely

because they judged the pre-October 18, 1957 claims of $177,863.84 to be valid and dangerous? For all the record shows the Duhame Estate may have had a valid and sound defense to the October 18, 1957 claim of $314,794.19 claim but none as to the pre October 18, 1957 claims. Thus, assuming arguendo, and for the moment only, that appellant DePinto had an absolute defense to the pre-October 18, 1957 claims of $177,863.84, such as he is now making here, that does not entitle him to penetrate another action (the Duhame action), and extract a defense from that lawsuit to help his cause here. The critical fact is that the Duhame Estate and appellee were entitled to settle the various claims as they saw fit, and they are not obliged to settle on a basis which another defendant deems more favorable to him.

What DePinto is asking the court to do is overturn the basis upon which appellee settled his lawsuit against the Duhame Estate under circumstances in which the court cannot permit or order the Duhame Estate case to be tried in view of such a rejection of the Duhame Estate settlement. That is, appellee should be entitled to proceed with his lawsuit against the Duhame Estate if the terms of his settlement are overturned as they would be if the October 18, 1957 claim of $314,794.19 received a credit of the $100,000 instead of the pre-October 18, 1957 claims of $177,863.84. Appellee would prefer to proceed against the Duhame Estate for the total of the three claims or $553,353.63 if he is required to apply $100,000 against

the $314,794.19 lost on October 18, 1957. The reason appellee was willing to accept $100,000 in settlement of all of the claims against the Duhame Estate was because it resulted in a settlement which did not lose any of the $314,794.19 claim. Otherwise the appellee required a larger sum before settlement with the Duhame Estate was acceptable. Therefore, the terms of that settlement should not be disturbed, at DePinto's request, unless appellee also has the right to proceed with his claims against the Duhame Estate. Since the case involving the Duhame Estate is not before the court and appellant DePinto is without power to return matters to the status quo before the Duhame Estate settlement so that appellee could proceed against the Duhame Estate, his contention that he should get the benefits of an overturning of that settlement while appellee is still bound thereto is untenable.

Turning to the merits of appellant DePinto's contention that there was only one claim for $314,794.19 lost to United on October 18, 1957 in the action against the Duhame Estate, assuming that he has standing to so contend in view of the settlement, it is noted that there is no merit to the argument.

In the Amended Complaint filed by John S. Gorsuch on November 16, 1959, at paragraphs 87, 88 and 89 of Count VI, claims were made against Elmer W. Duhame and appellant DePinto for breach of fiduciary duty and responsibilities to United resulting in

damages occurring on October 18, 1957 of $308,000, and prior to October 18, 1957 of $45,514.51 and $109,723.82. (T.R. 18). The $45,514.51 related to disbursements made to Kelly and the $109,723.82 concerned disbursements to United Finance. (T.R. 18). Later in the pretrial order of March 9, 1959, the plaintiff's contentions stated that appellant DePinto and Elmer W. Duhame breached their fiduciary duty to United in that they failed to exercise that diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like position by permitting the transfer of $314,794.19 of United's assets to American, by permitting through malfeasance the taking from United of $46,839.51 and the transfer of $86,000 to United Finance. (O.T. 245, 246). The $46,839.51 related to amounts disbursed to Kelly. (O.T. 243, 244, 246).

After trial during which the evidence heard concerned all of the above claims, the district court entered judgment only for the $314,794.19 lost on October 18, 1957. (O.T. 354). This judgment was however reversed and remanded by this court to permit intervention. Niesz v. Gorsuch, 9 Cir., 1961, 295 F.2d 909. A second judgment, also for just the $314,794.19, was reversed after Albert J. Doig had intervened as a plaintiff. (T.R. 26). This court held that having intervened as plaintiff in a class action brought by Gorsuch, and having introduced no new cause of action

herein, the filing of the Gorsuch complaint inures to Doig's benefit. Therefore, it is incorrect for appellant DePinto to state that under this court's decision in Niesz v. Gorsuch, supra, the Gorsuch complaint must be treated as non-existent. It follows that the existence of the additional claims in the Gorsuch amended complaint, giving notice to the Duhame Estate, cannot be avoided by such an argument. The same answer applies to appellants' contention that the statute of limitations ran on such claims. This court has already rejected that argument here in DePinto v. Provident Security Life Insurance Company, 9 Cir., 1963, 323 F.2d 826.

Following the second reversal here, a second pretrial order of 102 pages was prepared. (T.R. 91-194). Therein claims were made against the Duhame Estate for damages to United in the sum of $177,863.84 for the period between June 30, 1965, for $314,794.19 on October 18, 1957, and $60,695.60 for the period between October 9, 1957 and June of 1959. (T.R. 151, 159, 160). It was set forth herein, as it had been in the March 9, 1960 pretrial order, that Elmer W. Duhame had breached his fiduciary duty to United with respect to unwarranted payments of salary, travel allowances, travel expenses, legal fees, personal expenses of Kelly and his family, expenses of United Finance Corporation, advances and unauthorized loans, payments of excessive salaries, and actuarial fees. (T.R. 151, O.T. 227-234, 246).

In short, the Duhame Estate had notice of the pre-October 18, 1957 claims of $177,863.84 on November 16, 1959, again in detail in the first pretrial order of March 9, 1960, again in the fall of 1964 when the district court notified all counsel that the entire case was open both as to claims and theories, again prior to May 17, 1965 when the pretrial order was being prepared and submitted in draft form to all counsel, and again in the pretrial order of 1965. (T.R. 77, 85). It is therefore untenable for appellants to argue that there was only one claim against the Duhame Estate, and that in the amount of $314,794.19. It follows there is no merit to the contention that the $100,000 settlement with the Duhame Estate must be credited to the $314,794.19 claim made against the Duhame Estate rather than the pre October 18, 1957 claims against the Duhame Estate in the sum of $177,863.84. Appellee settled those claims with the Duhame Estate only on the reservation or condition that the sum be applied to and settle the pre-October 18, 1957 claims of $177,863.84. Appellant DePinto was thus relieved from having to defend against such claims and any potential liability therefor. He is not entitled to invade that settlement in another lawsuit, and in effect argue in a separate action that the $100,000 was not paid in settlement of such claims against the Duhame Estate.

c.

Interest Was Properly Allowed From October 18, 1957, The Date United's Loss Occurred.

The appellant DePinto and appellee, in the pretrial order entered June 10, 1965, and in the statements to the district court, stipulated and agreed that the issue of from what date interest would run was an issue to be decided by the district judge. (T.R. 168). Since the instant action is a stockholders' derivative action, an equitable action unknown to the common law and an invention of equity, it follows that the parties agreed the issue could be determined by an equity court. Therefore, because the rule in equity is that interest on an unliquidated claim is in the trial court's discretion,[8] the burden was on appellant DePinto and the intervenor trustee in bankruptcy to show by clear proof that the trial court abused its discretion.[9] This the appellants have not attempted to do, and not having made such a contention supported by argument in the opening brief, they have abandoned the point. Peck v. Shell Oil Co., 9 Cir., 1944, 142 F.2d 141, 143; Stetson v. United States, 9 Cir., 1946, 155 F.2d 359, 361. In this case,

8. Niesz v. Gorsuch, 9 Cir., 1961, 295 F.2d 909.
9. Miller v. Robertson, 266 U.S. 243, 258 (1924); Speed v. Transamerica Corp., 3 Cir., 1956, 235 F.2d 369, 374; Goldberg v. Paramount Pictures, 2 Cir., 1936, 85 F.2d 42, 45; Chrisholm v. House, 10 Cir., 1950, 183 F.2d 698, 709; Dorsett v. Shore, 4 Cir., 1957, 254 F.2d 373; United Light & Power Co. v. Grand Rapids Trust Co., 6 Cir., 1947, 85 F.2d 331, 338.

by the filing of this brief, appellee's opportunity to answer is closed, and such a contention by the trustee in bankruptcy and appellant De Pinto during oral argument will not afford appellee the fair notice and reasonable amount of time necessary to prepare a reply.

The second reason why interest was properly allowed from October 18, 1957 is that the modern law holds that interest is allowable on unliquidated damages from the date the damages were sustained in order to fully and fairly compensate the injured party. 36 ALR 2d 337 et seq. Here the damages occurred on a date nearly nine years ago, and the element of time is an important consideration. The United stockholders or United will not be fully compensated unless they receive the value of the property and the income therefrom since that date. If the rule were otherwise, it pays appellant DePinto to litigate indefinitely even if he knew to a certainty that he was liable. The reason is that he or the trustee in bankruptcy have already been able to earn 54% of the $314,794.19, and in eight more years would begin to make a profit from the negligence of appellant DePinto. Thus, an application of the doctrine of unjust enrichment requires the allowance of the interest from October 18, 1957.[10]

Next, the law of Arizona,[11] contrary to the contentions of the trustee in bankruptcy, allows interest from the date of the loss in

10. Recent Developments, Prejudgment Interest As Damages, 15 Stanford L. Rev. 10 for discussion of the allowance of prejudgment interest on the theory of unjust enrichment in negligence cases.

11. Absent an Arizona decision in point, Concordia Ins. Co. v. School Dist., 1931, 282 U.S. 545, holds the court has discretion to include

a stockholder's derivative action on a corporate claim for unliquidated damages resulting from loss of its property. Zeckendorf v. Steinfeld, 15 Ariz. 334, 138 P. 1044. This case has not been overruled, as will be shown, and cannot be distinquished, as the opening brief attempts, on the theory that it only involved money and therefore the damages were liquidated. It is the only Arizona case in point, and it allows interest on a corporate claim for unliquidated damages resulting from loss of its property.

In Zeckendorf, supra, the one claim which was sustained by the Supreme Court of the United States, Zeckendorf v. Steinfeld, 225 U.S. 445 (1912), was that arising out of a sale of its mining properties for $515,000, payable $115,000 in cash and the balance in four promissory notes of the purchasers, the Imperial Copper Company, payable in four equal quarterly installments. Zeckendorf charged on behalf of the corporation that Steinfeld unlawfully obtained part of the proceeds of the said sale, and proved that Steinfeld received the sum of $145,743.75 and one of the said promissory notes for $100,000 given by the Imperial Copper Company.[12] The final judgment was inspected by the Arizona Supreme Court which found that such judgment "is in accordance with the opinion and judgment of the Supreme Court, in that it is against Steinfeld and in favor of the Silver Bell Company

12. See Zeckendorf v. Steinfeld, 12 Ariz. 245, 260, 100 P. 784, 789, and Zeckendorf v. Steinfeld, 225 U.S. 446, 458, for a statement of the above facts.

'or the amount of money and the property appropriated by Steinfeld .o his own use." Zeckendorf v. Steinfeld, 15 Ariz. 334, 339, 138 P. 1044, 1046. The judgment also allowed the corporation "interest at 6 per cent per annum on the amounts recovered, from the date of the v rongful conversion."

The Arizona court then affirmed such allowance of interest "for he amount of money and the property appropriated" from the date of loss stating:

> " In United States v. North Carolina, 136 U.S. 211, 222, 34 L.Ed 336, 341, 10 Sup. Ct. Rep. 920, 922, the court said: ' Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the for the detention of money or property, ... ' * * *
>
> " ...It cannot be said that the lawful owner of property is fairly or reasonably compensated by an award of the return to him of his property or its value. As we understand it, the general rule, both at law and in equity, is that the owner is entitled to the return of his property or its value at the time of its wrongful conversion, together with damages which are usually estimated at the legal rate in the absence of a statutory rule." (Underscoring supplied)

Here the property lost was cash, promissory notes, bonds, mortgages, nd accrued interest. Therefore, under Zeckendorf, supra, the

law of Arizona requires the allowance of interest here from October 18, 1957 as the district court ruled.

More importantly the Arizona Supreme Court in a 1962 case allowed interest on unliquidated damages resulting from negligence, and allowed the interest from the date the damages occurred. Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 370 P. 2d 652. There the court held that if a condemnor who, after being granted possession prior to the date as of which the compensation is fixed, negligently diminishes the value of the property, compensation and damages therefor must be included in the award to the condemnee, and because the condemnee is deprived of the use of his property between the date of such entry and the date when compensation is paid to him, he is "entitled to interest on the amount of the award from the date of entry by the condemnor."

The 1962 decision in the Desert Waters, Inc. case, supra, not only reaffirms the doctrine of Zeckendorf, supra, allowing interest from the date of loss of property, but shows that the Arizona Supreme Court approves the modern view allowing interest on unliquidated negligence claims.[13] It also makes it plain that appellants' citation of the earlier cases of Schwartz v. Schwerin, 85 Ariz. 242,

3. "In actions for tortious injuries, damages usually now include interest, and are set by the jury when no ascertainable standards or measures are available." Oleck, Damages To Persons And Property § 300 at 641, 651 (1955 ed).

336 P.2d 144, and Arizona Eastern R. Co. v. Head, 26 Ariz. 259, 224 P. 1057, does not sustain their view.

In Schwartz v. Schwerin, supra, the claim was for attorney's fees on a quantum meruit basis. The court denied interest from the date of demand holding that the general rule denies interest on unliquidated demands for services until rendition of judgment. In order to reach that result it first had to expressly overrule three earlier cases involving claims for street repair work, road work, and ground leveling work respectively. The fact that the court's holding is limited to interest on unliquidated demands for services rendered, and its opinion did not overrule the Zeckendorf case, supra, while expressly overruling three other cases, demonstrates that Schwartz v. Schwerin, supra, does not support the principle that interest is not allowed from the date of loss of property by a corporation.

The same is true of the Arizona Eastern R. Co. case, supra. There two members of the Arizona Supreme Court refused to allow 2 per cent interest on the judgment from the date of filing suit because the interest claim was based on a section of the Workmen's Compensation Act which it held unconstitutional. The case is not at all concerned with the issue raised by appellants.

The foregoing shows that the interest is allowable even if the claim was unliquidated. An additional reason why interest is allowable is that appellant DePinto conceded the claim was liquidated in the pretrial order filed March 9, 1960. There, after agreeing that

$314,794.19 of specific assets were taken from United on October 18, 1957, he stated that "there are no material issues of any material fact as to him." (O.T. 237, 239, 261). Also, it is apparent that the $314,794.19 is readily calculable from the $166,498.66 in cash, $87,626.88 in promissory notes and accrued interest, and $60,668.65 in mortgages, bonds and accrued interest. According to appellants' theories, there is no argument that the $166,498.66 in cash is a liquidated claim. And under Zeckendorf, supra, the notes of $86,000 plus accrued interest draw interest from the date of loss; so, too. should the $60,668.65 of mortgages, bonds, and accrued interest which constitute property similar to that in Zeckendorf, supra.

Appellants' position in effect is that if one takes $314,794.19 from a corporation, leaving in exchange therefor a worthless tea kettle which the taker claims has great antique value, there can be no interest awarded on such damage because the value of the tea kettle must be determined to ascertain damages. So they argue here when they say that, since it was necessary to determine that the American stock was worthless, the damages are unliquidated and interest from the date of loss cannot be awarded. Such arguments prove the wisdom of the modern rule which permits interest on unliquidated claims as part of damages to allow full and fair compensation.

For the above reasons, and those contained at pages 63 through 71 of appellee's brief in No. 18245, the district judge should not be reversed for his order allowing interest from October 18, 1957

d.

Appellants Are Not Entitled To A Reduction Of The Judgment From $314,794.19 To $308,000 Because Of Judgments Entered Against Other Joint Tort Feasors For $308,000.

On the eve of the first trial in March, 1960, defendants James E. Kelly, L. N. Kelly, Nina Dunn and J. L. Jenkins stipulated to the entry of consent judgments against each of them in the amount of $308,000 (T.R. 24) which were entered after a trial had been had with respect to the liability of DePinto and others who had not confessed judgment. The trial court also entered judgment against DePinto and others in the amount of $314,794.19. Although DePinto appealed from that judgment (Cause No. 17114) he did not assign as error the entry of judgment against him therein in an amount in excess of that which was entered against James E. Kelly, L. N. Kelly, Nina Dunn and J.L. Jenkins. Having failed to do so then, he cannot be heard to complain now. That issue, if it ever was an issue, was abandoned by DePinto on the first appeal and he is precluded from raising it at this late date.

However, even if DePinto had not previously waived the contention of error he is now attempting to assert, it is, nonetheless, without merit for it is hornbook law that a judgment is not a release. A judgment entered by stipulation, that is, a so-called "consent judgment" is just like any other judgment. Cochise Hotels v. Douglas Hotel Operating Co.,

33 Ariz. 40, 47, 316 P. 2d 290; Wall v. Superior Court, 53 Ariz. 344, 89 P. 2d 624. Since the consent judgments entered against James E. Kelly, L. N. Kelly, Nina Dunn and J. L. Jenkins were not releases, the "rules applicable to a release" relied upon by DePinto at page 56 of his brief are not relevant.

Furthermore, since the judgment from which the present appeal is being taken is one which was entered against DePinto alone after a trial against him alone, the rule that the jury may not apportion damages amongst joint tortfeasors is also irrelevant. For that reason the section of 49 CJS, Judgments which DePinto has cited at page 56 of his brief together with cases taken from the footnotes to the said section of CJS is not in point.

It remains to be noted that it is also hornbook law that a judgment entered against a joint tortfeasor constitutes a discharge of other joint tortfeasors only when and to the extent that the said judgment is followed by actual satisfaction thereof. Thus, DePinto's liability can be discharged only to the extent that judgments entered against any of the other joint tortfeasors have been satisfied. That, it is submitted, is a matter which can be raised by DePinto in the district court at such time as satisfaction is sought from him.

The District Judge Did Not Abuse His Discretion In Granting A Motion To Consolidate The Suits Involving Sabo, Landoe And Pegram, Being Civil No. 2974 And Civil No. 3062, And Ordering A Separate Trial For DePinto.

During the earlier appeals here, appellant DePinto, speaking through his present counsel, complained in his briefs that "DePinto got lost in the shuffle," and that when "the lower court machine-gunned the cast of characters," the "widespread fusillade caught DePinto." He then pleaded that the court should "focus its judicial microscope" on the parts of the record related to him. In short, DePinto was contending that he had been prejudiced or harmed by having had to try his case along with several others whose conduct had been very bad. However, when the district court eliminated any such danger for the third hearing by ordering a separate trial, DePinto reversed his field and claimed that it was error and prejudicial that a trial be had as to his liability and his alone.

The most surprising aspect of the present position and claim of error is that had the district court ordered DePinto to proceed to trial with Sabo, Landoe and Pegram, the appellee would have been entitled to have a hearing on his Securities and Exchange Acts cause of action against Sabo and Landoe which Landoe wanted consolidated

with Civil No. 2974, and in the Securities and Exchange Act case the jury would have heard testimony and examined exhibits offered to show violations of such acts.

Perhaps it would be helpful to the court to have before it some of the relevant facts relating to appellants' latest contention that DePinto was entitled to a trial with others and was prejudiced by a separate trial as to his liability.

The complaint in Civil No. 2974 was filed on November 4, 1958. (O.T. 3, 22). That complaint did not name Francis I.Sabo and Hjalmer B. Landoe of Bozeman, Montana as defendants. Rather, on May 25, 1959 a complaint was filed by John S. Gorsuch asserting a civil cause of action for damages on behalf of United and against Sabo and Landoe based on violations of the Securities and Exchange Act and regulations of the Securities and Exchange Commission. Gorsuch v. Francis I. Sabo and Hjalmer B. Landoe, Civil No. 3062, Phoenix. Included in the claims therein was the loss of $314, 794. 19 to United on October 18, 1957. Answers were filed by Sabo and Landoe on July 10, 1959.

However, on August 25, 1959 Sabo and Landoe filed a motion to intervene in this action, and leave was granted on September 14, 1959. (O.T. 1346, 1347). On June 1, 1965 appellee moved to consolidate for purposes of trial the hearing in Civil No. 2974 and that in Civil No. 3062. (T.R. 290). Later, on June 3, 1965 the Duhame Estate filed a motion for a separate trial pursuant to the

provisions of Rule 42 (b), Federal Rules of Civil Procedure. (T.R. 290). The Duhame motion for separate trial stated that such defendant would be prejudiced and that confusion would result. (R. T. 11, 12). Thereafter, on June 10, 1965 appellee agreed that the Duhame Estate's motion for separate trial should be granted, asked that trial proceed against the Duhame Estate, offered to proceed with the trial against DePinto immediately thereafter, and suggested that some time elapse before a hearing on the cases involving Sabo, Landoe and Pegram. (R.T. 7, 11). One of the reasons given by appellee for agreeing with the Duhame Estate's motion for a separate trial was the following:

> " What I am concerned about is that regardless of the results of the consolidated trial these people will go up to the Court of Appeals and will be threshing around for the next two or three years because they claim they have been prejudiced by something that some other defendant did, or by evidence that was introduced against some other defendant.
>
> " I think that this would wipe out that aspect of the case completely out of the courtroom, and the only problem would be whether there was a fair trial against Duhame, and Duhame alone." (R.T. 12).

Thereupon, the district court asked DePinto to state his position. DePinto stated that if the case was to start against DePinto alone, he "would object very strenously to going it alone", but that "if the

case were to be deferred as to the defendant DePinto so that we might not have to face it at all, then I would have to say that I couldn't quarrel with it." (R.T. 16, 17). Sabo, Landoe and Pegram adopted the same view as DePinto. (R.T. 18).

At 9:30 A.M. on Friday, June 11, 1965, the date set for trial, the Duhame Estate offered to settle its liability for $100,000 by making a formal offer in court, and appellee accepted upon certain conditions. (R.T. 147, 148, 149). Thereupon, appellee renewed his motion to consolidate Civil No. 2974 and Civil No. 3062, the latter being the Securities and Exchange Act case against Sabo and Landoe. (R.T. 164, 165). Appellee also moved to proceed as to the trial of DePinto's liability in a separate trial. (R.T. 165). Landoe and Pegram objected to two trials in Civil No. 2974 and Civil No. 3062, agreed to the appellee's motion to consolidate, and moved for a continuance. (R.T. 167). Sabo agreed to the separate trial with respect to DePinto. (R.T. 168). DePinto objected to a separate trial as to him on the twin grounds that it was his "assumption" that appellee was going to call Sabo, Pegram and Landoe as witnesses which would mean, if a separate trial was held as to DePinto, that he could not examine these persons, and that DePinto had cross-claims against Sabo, Pegram and Landoe that he would be prevented from trying. (R.T. 166, 169).

In view of DePinto's first objection that he would be unable to examine Sabo, Landoe and Pegram, none of whom had been served

with subpoenas due to their residence outside of Arizona, the district judge directed counsel for Sabo, Landoe and Pegram to make those persons available as witnesses. (R.T. 171, 172) At that point DePinto's counsel was asked which witnesses he wished to appear, and he answered:

> " If your Honor please, I think the only person that we would want to call would be Mr. Landoe." (R.T. 173).

The witness Landoe was never called by DePinto at the subsequent trial nor was any report made to the district judge that Landoe had not been made available.

With respect to the other objection to the separate trial for DePinto - that he had cross-claims against Sabo, Landoe and Pegram - the district judge ruled that they were contingent cross-claims depending on DePinto's liability, and that they could be tried, if necessary, in the consolidated actions against Sabo, Landoe and Pegram in Civil No. 2974 and Civil No. 3062. (R.T. 170). It was also pointed out that it had been held in this action in March of 1930 that under Arizona law contribution between joint tort feasors was not permitted, and the cross-claims were dismissed. (O.T. 318, 319; R.T. 169, 170).

The district court then granted the motion to consolidate Civil No. 2974 and Civil No. 3062 with respect to Sabo, Landoe and Pegram which had previously been agreed to by Landoe and

Pegram, and granted a separate trial as to DePinto after granting the motion for continuance of Landoe and Pegram with respect to the consolidated cases in Civil No. 2974 and Civil No. 3062. (R.T. 170, 171). It also continued the beginning of the trial of the DePinto case until the following Monday, June 14, 1965 and directed that the jury be empanelled during the afternoon of June 11, 1965. (R.T. 173).

In view of the foregoing, DePinto's two objections made to the district court with respect to a separate trial as to him are without merit. The district court went to great lengths to see that he had an opportunity to examine Sabo, Landoe and Pegram who were made available to him. He chose not to call such witnesses, and told the trial court so. How can he possibly, in the face of that record, tell this court that he was deprived of an opportunity to examine those witnesses? And as was shown the right to try his cross-claims has not been denied him should his liability be affirmed here. If in the face of the Arizona law denying the right of contribution to joint tort feasors, the trustee in bankruptcy should wish to press an action against Sabo, Pegram and Landoe at the hearing on Civil No. 2974 and Civil No. 3062, the district court has already ordered that he has that right.

It is also incorrect for the trustee in bankruptcy to conclude that "as a result of the trial Court's action, the attorneys for plaintiff

presented evidence to the jury only in the form of documents, 'admitted facts' and testimony adduced at the initial trial." That judgment was made prior to the decision of the district court since there was no way for appellee to compel the attendance of the Montana defendants. Thus, the appellant DePinto was given a right which appellee did not have. The statement also leaves the impression such evidence was the only evidence offered at the trial whereas DePinto testified. In any event if the evidence produced was not sufficiently persuasive, that would be to DePinto's benefit since it was the appellee who was required to carry his case by a preponderance of the evidence.

The district court specifically referred to its power to order a separate trial under Rule 42 (b) when considering the Duhame Estate's motion for a separate trial, and Rule 42 (a) provides for consolidation. Thus, the contention of the trustee that Rule 21 authorizes a severance only where there has been a misjoinder of parties is neither applicable nor correct. After referring to the last sentence of Rule 21 that: "Any claim against a party may be severed and proceeded with separately", 3 Moore, Federal Practice § 21.05 at 2910 states:

> "Does the quoted sentence also authorize the court to sever and proceed separately with a claim that was properly joined? In many, perhaps most cases, the question need not

be answered for severance is unnecessary, since Rule 42 (b) gives the court a broad power in furtherance of convenience or to avoid prejudice to order a separate trial of any claim, or of any number of claims or issues. ... there are, however, occasions when the last sentence of Rule 21 may properly be used to sever a claim that has been properly joined."

Therefore, since the district court has the discretion under Rule 42 (b) to order a separate trial,[14] Rule 21 does not prohibit it from doing so and there are even instances where Rule 21 itself allows a separate trial. The trustee in bankruptcy was required to show that the district court abused its discretion under Rule 42 (b), and he has not attempted to do so.

The trustee's statement that "it is obvious that the action of the trial court was highly prejudicial to DePinto" is a statement of conclusion or preference. Why was he prejudiced by a separate trial as to his liability alone? Was it prejudice when the district court protected him from being "lost in the shuffle" or "machine-gunned" down while among a "cast of characters"? The appellee had the right initially to name him as the only defendant against whom the action was brought. If he is prejudiced by a separate trial now, then naming him alone would constitute the same prejudice.

14. Bedser v. Horton Motor Lines, Inc., 4 Cir., 1941, 122 F.2d 406.

In like fashion his contention that he was placed in the position of "a 'target' defendant for the jury to shoot at" is not, even if it were correct, sufficient as error. Every joint tort feasor who remains to the end of litigation is a 'target' defendant in that sense. Should appellee settle and enter covenants with Sabo, Pegram and Landoe, DePinto would not even be able to argue this point because he concedes he has no right to prevent settlement with other parties. All the trustee is arguing is that DePinto was prejudiced because the jury and the district court were able to focus their respective "judicial microscopes" on his liability, and because he was not "lost in the shuffle." The burden of his contention is that he has a right to confuse a jury and play upon its emotions so that it is more likely to pass the entire burden on to the defendants from Montana.

Lastly the trustee's statement that the "conclusive evidence of the prejudice to DePinto is found in the verdict rendered in his favor at the initial trial" is invalid. If the verdict in a party's favor at an earlier trial constituted conclusive evidence of prejudice when a later jury reached a different result, there would be no point in this court ever remanding a case for a new trial after a jury verdict.

Since appellee instituted his Securities and Exchange Act case against Sabo and Landoe prior to the time when each intervened in the instant action, it ought to follow that he is entitled to a hearing

therein prior to or at least at the same time with the instant action in which they intervened and that Sabo and Landoe are not required to defend two trials instead of one. All the trustee is going to require, in order that he can have a trial with Sabo, Landoe and Pegram, is that appellee must be deprived of a hearing in Civil No. 3062 until after DePinto has had a joint trial with Sabo, Landoe and Pegram, that appellee not settle the instant action with Sabo, Landoe and Pegram, that Sabo and Landoe defend two lawsuits at two separate times, and that the district court must accomodate its trial calendar to these needs. The only other solution would be if DePinto had defended his case in the same consolidated hearing with Civil No. 3062 in which case he would no doubt assign as error the prejudice which occurred when the jury heard testimony and looked at documents proving that other defendants had violated the Securities and Exchange Act and the regulations of the Securities and Exchange Commission.

The district court should not be reversed for giving the appellant DePinto the very kind of trial which eliminated any chance that he would be "lost in the shuffle" and thereby prejudiced. It resolved the matter in the best interests of all of the defendants. No joint tort feasor is prejudiced by a separate trial as to his liability alone. What better way is there, if a plaintiff is ready to take the additional burden, of insuring that a defendant is not prejudiced by the presence of other defendants?

The District Judge Did Not Err In Proceeding After Appellant DePinto Filed An Affidavit Of Bias And Prejudice, And Appellant DePinto Was Not Deprived Of A Fair Trial.

The affidavit of bias filed by appellant DePinto was filed after this court had rejected, in 1964, his motion to have the case assigned to another judge and after appellee had filed a motion for partial summary judgment as to liability only.

Appellants contend that the mere act of filing the affidavit of bias and prejudice under 28 U.S.C.A. § 144 deprived the district judge of any power to proceed. They cite as authority therefor Berger v. United States, 255 U.S. 22 (1922). The case does not so hold. It ruled that though the challenged judge may not pass on the truth of the alleged facts, he may decide whether the affidavit meets the procedural requirements laid down in the statute and whether the facts give fair support to the charge of bias and prejudice. (Berger v. United States, supra, p. 33-34).

The statute itself provides that whenever a party in a district court proceeding files a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to

hear such proceedings." It further requires that the affidavit "shall state the facts and the reasons for the belief that bias or prejudice exists." When such an affidavit is filed, the only question is whether, assuming the correctness of the facts alleged, they are legally sufficient to show "personal bias or prejudice." Berger v. United States, supra.

A judge is not personally biased and prejudiced within the meaning of this provision because of opinions or judgments that he has formed on the basis of the proceedings or evidence in the case before him. "The bias or prejudice which can be urged against a judge must be based on something other than rulings in the case" (Berger v. United States, supra, p. 31). To be disqualifying, the alleged bias and prejudice must be against the defendant personally, i.e., it must stem from some extra-judicial source and must lead the judge to form an opinion as to the merits of a particular legal controversy on some basis other than what he has learned through his participation in the case. Berger v. United States, supra; Ex parte American Steel Barrel Co., 230 U.S. 35; Lyons v. United States, 325 F.2d 370 (C.A. 9); Gallarelli v. United States, 260 F.2d 259 (C.A. 1); Craven v. United States, 22 F.2d 605 (C.A. 1), certiorari denied, 276 U.S. 627; United States v. Garden Homes, 113 F. Supp. 415 (D. N.H.), affirmed per curiam, 210 F.2d 281 (C.A. 1); United States v. 16,000 Acres of Land, 40 F. Supp. 645

(D. Kan.). "Impersonal prejudice resulting from a judge's background or experience",[15] his "comments and criticisms",[16] "indiscreet expressions",[17] irritation at a party's dilatory tactics[18], or hostility toward counsel[19], do not establish the personal bias and prejudice which the statute requires for disqualification. A fortiori, an opinion formed from the evidence in the case cannot ground a charge of personal bias and prejudice. Ryan v. United States, 99 F. 2d 864 (C.A. 8), certiorari denied, 306 U.S. 635; United States v. 16,000 Acres, supra.

The affidavit of bias and prejudice filed by appellant DePinto contains no allegations whatever asserting personal bias and prejudice, Instead it is a recitation of the rulings and actions in this cause with which appellant DePinto disagrees. Therefore, U. S. District Judge Carl A. Muecke, to whom the matter was assigned after Judge Boldt referred it to Senior U. S. District Judge James Walsh, was correct in ruling that the affidavit failed to show facts or reasons to indicate personal bias or prejudice on the part of Judge Boldt. (T.R. 287). To the extent it was necessary Judge Boldt affirmed or concurred in Judge Muecke's ruling. (T.R. 287).

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15. Eisler v. United States, 170 F. 2d 273 (C.A.D.C.), certiorari dismissed, 338 U.S. 883; Price v. Johnston, 125 F. 2d 806 (C.A.9).
16. Scott v. Beams, 122 F. 2d 777 (C.A.10), certiorari denied, 315 U.S. 809.
17. In re Lisman, 89 F. 2d 898 (C.A.2).
18. Refior v. Lansing Drop Forge Co., 124 F. 2d 440 (C.A.6), certiorari denied, 316 U.S. 671.
19. Sanders v. Allen, 58 F. Supp. 417 (S.D. Calif.)

The affidavit of bias and prejudice was also untimely as Judge Muecke ruled. It was filed nearly five years after Judge Boldt was assigned to the case, and after appellee had filed a motion for partial summary judgment as to liability only. (T.R. 287).

Also, the affidavit of bias and prejudice was, as Judge Muecke also ruled, not appropriate in view of the earlier decision of this court rejecting the motion of DePinto that the case be assigned to another judge.[20]

There is a further reason, not mentioned by Judge Muecke, why the affidavit is defective. The certificate of counsel is not sufficient in that it merely certifies that the client was in good faith in making the affidavit. United States v. Flegenheimer, 14 F. Supp. 584 (N.J., 1935). Section 144 requires that the affidavit "shall be accompanied by a certificate of counsel of record stating that it is made in good faith." This provision has been construed to mean that the good faith of counsel of record as well as the good faith of the client must be certified. United States v. Gilboy, 162 F. Supp. 384, 392; United States v. Flegenheimer, supra.

Throughout the argument in appellants' opening brief concerned with the affidavit of bias and prejudice assignment of error it is

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20. Having raised the question of Judge Boldt's alleged personal bias and prejudice once, DePinto cannot raise it again. Peckham v. Ronrico Corporation, 22 F.2d 605, 607 (C.A. 1).

repeatedly stated that the district judge erred in rulings or that he was not impartial because of such rulings. Because such an argument is not sufficient under the law to support an affidavit of bias and prejudice, appellæedeclines to assume the stance of one defending a district judge on such charges. The filing of the affidavit of bias and prejudice against a visiting district judge based on nothing more that rulings in the case, accompanied be a defective certification from DePinto's counsel, speaks for itself.

DePinto will never be satisfied that he had a fair trial until some jury or some district judge can be found who will rule in his favor. More precisely, the trustee in bankruptcy will never agree that DePinto had a fair trial until a fund is created for the commercial general creditors who, in 1965, extended credit to a corporation, Trosco Land, Inc., on the personal guarantee of DePinto who owned one-third of its stock.

CONCLUSION

The judgment against DePinto, based on a genreal verdict of a jury, should be affirmed. Should the court conclude that the trial court erred in denying the motion for judgment notwithstanding the verdict, then, in that event, and in that event only, appellee contends that he is entitled to a new trial as a matter of right under the Seventh Amendment, Crim v. Handley, 94 U.S. 652, 657, and because the trial court erred in the rejection of certain evidence offered by appellee, and in the admission into evidence of testimony and evidence in the

trial below over the objections of appellee. In the event the court should conclude that the trial court erred in denying the motion of DePinto for judgment notwithstanding the verdict, then, in that event, and in that event only, appellee requests leave of the court to file a memorandum in support of the foregoing grounds upon which he would be entitled to a new trial.

Respectfully submitted,

MC LANE & MC LANE

William Lee McLane

By William Lee McLane
Nola McLane

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William Lee McLane

William Lee McLane

Appellee disagrees with appellants' Statement of Facts as follows:

(1) The statement at page 5 that a few days prior to October 18, 1957, Kelly told DePinto that the money to purchase his stock was coming from Sabo is incorrect. Kelly testified, as a witness for DePinto, that he never learned that Sabo was in the picture or knew the name Sabo until October 18, 1957 or October 19, 1957. (R.T. 311).

(2) The inference, at pages 5 through 7, that DePinto's resignation was in fact accepted before the adoption of the resolution transferring United's assets to American is based solely on the conclusion which DePinto attempts to draw from the placement of the paragraphs in United's minutes of 4:15 p.m. on October 18, 1957. However, such minutes are unsigned by anyone including the Secretary, and it was stipulated only that DePinto resigned "about 4:15 p.m." on October 18, 1957.

(3) The statement, at page 7, that DePinto did not receive any money, benefit or compensation for his services as a director of United incorrectly states the testimony of Kelly. The latter replied to a leading question on cross-examination from DePinto in the negative when asked if DePinto had "received any money or any benefit whatever in compensation for his services as a

director of United incorrectly states the testimony of Kelly. The latter replied "No" to a leading question on cross-examination from DePinto which asked if DePinto had "received any money or benefit whatsoever in compensation for his services as a ditector." (R.T. 314). It will be remembered that DePinto in the companion appeal is arguing that the community got no benefit from his services as a director of United. Thus, it is important to note the above discrepancy and the source of the testimony.

(4) The recitation of the October 18, 1957 American minutes, at page 7, is not in the proper chronological order. Those minutes were for a 3:30 p.m. meeting of American's directors which was held prior to the 4:00 p.m. meeting of United's directors and the 4:15 p.m. meeting of United's directorsat which United accepted the 3:30 p.m. offer of American to transfer 30,800 shares of its stock to United for $308,000 of United's assets. (T.R. 117-126). Thus, the 3:30 p.m. minutes set the pattern rather than vice versa.

(5) The reference at page 8 to Heineman's testimony is incorrect. Heineman testified he prepared the drafts for Exhibits 5-G and 5-H rather than the minutes themselves. (R.T. 416, 424, 449).

(6) With reference to page 8, it needs to be added that at the meeting among the attorneys from three separate law offices held at the offices of Jennings, Salmon, Strauss & Trask, no one represented

United. The Salmon firm represented Kelly. (R. T. 441). Heineman represented Croydon. (R. T. 466). Goss represented American. (R. T. 476).

(7) Again, with reference to page 8, it should be noted that Heineman did have "legal misgivings" about the transaction. He testified that the transaction as it went through was illegal, and that he had told counsel for DePinto that it was illegal. (R. T. 455).

(8) The testiomny referred to at page 9 that the outsiders were "top people" was that of Kelly, the man who got the $308,000 of United's assets by turning the company over to them. (R. T. 306, 309).

(9) The reference at page 9 to the reputation of Mr. Heineman, who represented Croydon and earned a $9,057.28 commission on the sale of Kelly's stock to American, is not relevant to DePinto's negligence or breach of fiduciary duty.

(10) The same is true of the reputation of the members of the firm which represented Kelly, that is, the reputations of Salmon, Campbell and Glenn who are mentioned at page 9.